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90-1142

No. —

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF NEW JERSEY,

Petitioner,

v.

NATHANIEL HARVEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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QUESTION PRESENTED FOR REVIEW

A. Context

Respondent was arrested for a crime unrelated to the instant, capital murder. During the next 56 hours, officers eight times recited *Miranda* warnings, and respondent was otherwise reminded four times. After the eighth repetition, respondent said that he would describe the killing, but that he initially wanted to consult his father. The request was honored, and three hours later, after questioning resumed, respondent confessed. The officers had not issued a fresh set of warnings.

The New Jersey Supreme Court suppressed the confession. It held that respondent had invoked his right to remain silent by asking to see his father. Then, it followed an earlier case, allegedly decided on state grounds, holding that once a suspect invokes his right to silence, the officers must issue *Miranda* warnings before they resume questioning.

B. The Question

Once the New Jersey Supreme Court admits that the recitation of *Miranda* warnings will safeguard a state right, can the court distort *Miranda* and the Fifth Amendment, yet evade this Court's review by making a naked declaration that an independent and adequate, state ground supports the state court's decision?

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Petitioner State of New Jersey prays that a writ of *certiorari* issue to review the judgment and opinion of the New Jersey Supreme Court, entered October 18, 1990.

OPINIONS BELOW

The oral opinion of the Superior Court of New Jersey, Law Division (Nicola, J.S.C), has not been reported, but it is appended as Appendix B. The opinion of the New Jersey Supreme Court is reported at 121 N.J. 407, 581 A.2d 483 (1990), and is appended as Appendix A.

JURISDICTION

On October 18, 1990, The New Jersey Supreme Court reversed respondent's capital, murder convic-

tion and suppressed his oral confession. We seek *certiorari* to review this opinion and, pursuant to Rule 14.1(e)(iii), invoke 28 U.S.C. sec. 1257(a) as the source of this Court's jurisdiction.

FEDERAL CONSTITUTIONAL PROVISION INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT V.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

At approximately 2:00 a.m. in the morning on Father's Day, June 16, 1985, respondent, carrying a hatchet (see T10/2/86 at 119), surreptitiously entered the ground-floor apartment of Irene Schnaps in Plainsboro. When Schnaps awoke and physically tried to protect herself and her property, respondent killed her. At least 15 times he bludgeoned her head with a hatchet, repeatedly fracturing her skull and breaking her jawbone. (T10/1/86 at 138-154). Respondent next washed Schnaps' body and changed the bedsheets, throwing the bloodied bedsheets in a dumpster as he escaped undetected. (T10/1/86 at 119). Only a bloody, Pony-brand, sneaker print, a negroid, pubic hair, and some small smatters of blood matching

respondent's blood type mutely implicated respondent. (T10/1/86 at 95; T10/7/86 at 123-138; T10/8/86 at 27-36).

Guided by an expert's opinion that the murderer was short (T10/7/86 at 33), Middlesex County officials began to seek a short, black male wearing Pony sneakers. This description was also provided to neighboring police agencies, including the West Windsor Township Police Department. Thus, when at 7:30 a.m. on October 28, 1985, respondent (a short, black male wearing Pony sneakers) was arrested in West Windsor on charges unrelated to the Schnaps murder, the arresting officers notified Plainsboro and Middlesex County officials. (T9/9/86 at 19; T10/2/86 at 38-39; T9/11/86 at 136).[1]

During the next 56 hours, three West Windsor Township detectives and two Middlesex County detectives read or recited *Miranda*[2] warnings to respondent eight times before questioning him about the Schnaps murder or the unrelated charges. (T9/11/86 at 136; T9/9/86 at 38,44-46; T9/12/86 at 106-107, 132-133; T9/15/86 at 9-11, 13-14, 26). Twice more they reminded respondent that he had a right to remain silent and a right to counsel. (T9/9/86 at 48; T9/10/86 at 103-104; T9/11/86 at 146; T9/12/86 at 31). Yet twice more at arraignments two judges told respondent that he had a right to remain silent and a right to counsel. (T9/12/86 at 69-70; T9/17/86 at 121).

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[1] The sneakers which respondent was wearing when he was arrested could not have made the bloody, sneaker print at Schnaps' apartment. (T10/7/86 at 39).

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966)

Respondent, however, did not request counsel nor did he decline to speak.[3] Rather, he admitted that he understood his rights (T9/9/86 at 45-46) and during the morning of October 30, 1985, admitted killing Schnaps to Middlesex County Detective Thomas Rizzo. (T10/2/86 at 115). Respondent then said that he would describe how he committed the murder, but he initially wanted to see his father and tell him the news before he read it in the newspapers. (T10/2/86 at 115-116).[4] Respondent made this request at 11:00 a.m. (T9/15/86 at 34).

Not until 2:30 p.m. did respondent leave his father, at which time the interrogation recommenced. The officers did not issue another set of *Miranda* warnings before they took respondent's informal confession. (T9/15/86 at 16-21). After respondent described the murder, the officers administered one last set of *Miranda* warnings in anticipation of taking a formal, tape-recorded statement. This time, respondent said, "I would like to have a lawyer present while I give you this statement. There would be no problem with that." (T9/15/86 at 39-40). The officers immediately stopped their questioning, which never resumed.

After being indicted for capital murder, respondent in a timely fashion challenged the admissibility of his confession. This motion was heard and denied before a jury was selected. (See App. B). Respondent was eventually convicted and sentenced to death. 121 N.J. at 412, 581 A.2d at ___ (App. A at 3).

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[3] The second time respondent was questioned, he twice requested time to think. The requests were granted. (T9/9/86 at 45-46, 48).

[4] See n. 8, below.

Deciding respondent's appeal as of right,[5] The New Jersey Supreme Court considered respondent's claim that the confession was erroneously admitted. The court found "no evidence of police coercion or misconduct" and "no extended interrogations designed to wear down [respondent's] will." 121 N.J. at 418, 581 A.2d at ___ (App. A. at 9). The court found that even if respondent did invoke his right to remain silent on October 28, 1985 (when he requested time to think), any failure of the officers to honor that right did not taint the questioning of October 30, 1985. *Id.*

Nevertheless, the court reversed the conviction and invalidated the confession. Preliminarily, the court held that when he asked to see his father, respondent invoked his right to remain silent; he "sought to terminate the interrogation." 121 N.J. at 420, 581 A.2d at ___ (App. A at 9-10). Next, the court concluded that the officers erred fatally when they failed to issue new *Miranda* warnings before they took the informal confession. In reaching this decision, the court followed *State v. Hartley*, 103 N.J. 252, 511 A.2d 80 (1986), in which it had held that once a suspect in custody invokes his right to remain silent, police officers must administer a fresh set of *Miranda* warnings before they question him anew. 121 N.J. at 420, 422, 581 A.2d at ___ (App. A. at 11).

REASONS FOR GRANTING THE WRIT

The New Jersey Supreme Court has handicapped the efforts of law enforcement officers in New Jersey, burdening them with obligations which this Court has

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[5] N.J.Ct.R. 2:2-1(a)(3)

never required them to shoulder. The supreme court has abandoned the totality-of-the-circumstances test which this Court has traditionally employed to determine whether statements are voluntary and has instead reaffirmed its own aberrant, *per se* rule that police officers must issue fresh *Miranda* warnings before they renew interrogation if a suspect invokes his right to remain silent. Similarly, the New Jersey Supreme Court has erroneously concluded that a suspect can exercise his right to silence not merely by requesting counsel and not even merely by declining to speak. Rather, according to the supreme court, a suspect in custody can now exercise his right to silence by requesting to consult a parent.

In the instant case the New Jersey Supreme Court misread *Michigan v. Mosley*, 423 U.S. 96 (1975), and ignored *Fare v. Michael C.*, 442 U.S. 707 (1979), and *California v. Patrick Steven W.*, 443 U.S. 902 (1979). The resultant, unsanctioned extensions of *Miranda* violate this Court's holding in *North Carolina v. Butler*, 441 U.S. 369, 376 (1979), that "a state court can neither add to nor subtract from the mandates of the United States Constitution." As we shall show, moreover, the court did not merely misread *Mosley*, and ignore *Michael C.*, and *Patrick Steven W.* It perverted *Miranda*.

By granting our petition, this Court can redress the terrible result reached in this particular case, in which a capital, murder conviction has been reversed and the case emasculated. Moreover, by granting our petition, this Court can corral wayward, state courts and remind them that this Court alone will define the parameters of the United States Constitution.

A. THE NEW JERSEY SUPREME COURT USURPED THIS COURT'S POWER AND HANDICAPPED LAW ENFORCEMENT EFFORTS IN NEW JERSEY BY REQUIRING POLICE OFFICERS TO ADMINISTER FRESH MIRANDA WARNINGS TO A SUSPECT IN CUSTODY WHO HAS PREVIOUSLY INVOKED HIS RIGHT TO REMAIN SILENT.

This case is *North Carolina v. Butler* revisited. In *Butler*, the North Carolina Supreme Court required police officers to obtain a specific, oral waiver of the right to counsel from a suspect before they interrogated him. In the instant case, the New Jersey Supreme Court blindly followed the " 'bright-line' rule" of *State v. Hartley* and held that "[w]hen a defendant seeks to terminate an interrogation, the police must at a minimum give fresh *Miranda* warnings before recommencing questioning." 121 N.J. at 420, 422, 581 A.2d at ___ (App. A at 11, citation omitted). Only in this way, concluded the court, could police officers follow *Miranda*'s requirement that a suspect's invocation of his right to remain silent be "scrupulously honored." 384 U.S. at 479.

Just as this Court rejected the efforts of the North Carolina Supreme Court to require a specific type of waiver, so too must this Court now reject the efforts of the New Jersey Supreme Court to preclude a waiver unless police officers readminister *Miranda* warnings whenever they commence to reinterrogate a suspect who has previously invoked his right to remain silent.[6] It is time for this Court to remind the

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[6] For the purposes of this portion of our argument only, we accept the view of the New Jersey Supreme Court that respondent did invoke his right to remain silent. Otherwise, as we show in Part B, we reject the claim.

New Jersey Supreme Court that it cannot create an "inflexible rule that . . . go[es] beyond the requirements of federal organic law," *Butler*, 441 U.S. at 377, and that this Court, and not the state courts, will decide what the federal Constitution demands and permits.

We start at the beginning. In *Miranda*, this Court did indeed conclude that police officers must "scrupulously honor[]" a suspect's invocation of his right to remain silent: this Court ruled that any interrogation must cease once a suspect indicates "in any manner that he wishes to remain silent." 384 U.S. at 473-474. In *Michigan v. Mosley*, 423 U.S. 96 (1975), however, this Court concluded that police officers do not dishonor a suspect's invocation of his right to remain silent if they question him anew after some time passes. This Court did not specify that police officers be obligated to wait a certain amount of time, or that they be obligated to question the suspect about a different offense, or that they be obligated to administer a fresh set of *Miranda* warnings to honor scrupulously a suspect's invocation of his right to remain silent (although in fact new warnings were recited to Mosley). Rather, this Court simply evaluated "the particular facts and circumstances surrounding [the] case," as *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), requires, and decided that Mosley's rights were protected even although he was reinterrogated.

That *Zerbst* is the standard by which courts are to judge the voluntariness of a statement is evident. *Miranda* cites it, 384 U.S. at 475, and *Butler*, 441 U.S. at 374-375 and *Schneckloth v. Bustamonte*, 412 U.S. 218, 235-240 (1973), confirm that *Zerbst* is the standard to be employed.

Moreover, that *Zerbst* be the standard is appropriate. After all, the *Miranda* warnings are not an end in themselves. Indeed, they are disposable if "Congress and the States" can find equally "effective ways of protecting the rights of the individual." 384 U.S. at 467. See also 384 U.S. at 444 ("[U]nless other fully effective means are devised to inform [suspects] of their right to silence . . . , the following measures [*i.e.*, the warnings] are required."). Rather, what concerned this Court almost a quarter of a century ago and what continues to concern this Court is the need for "procedural safeguards," 384 U.S. at 444, which will tell a suspect what his rights and options are. See also 384 U.S. at 457 ("[O]fficers [must] undertake to afford appropriate safeguards at the outset of the interrogation to insure that [any] statements [are] truly the product of free choice.").

We see then that *Miranda* is not a labyrinth, designed to entrap the unwary police officer who fails to trail the proper ball of twine behind him. *Miranda* is instead a device intended to help a suspect understand that he need not answer questions, but that he may if he is willing to face adverse consequences. The choice is his.

In *Hartley*, the New Jersey Supreme Court correctly observed that once *Miranda* warnings are given and invoked, continued, unlawful interrogation works a constitutional violation, rather than a violation of *Miranda*'s prophylactic purposes. 103 N.J. at 271-278, 511 A.2d at ___ . Then, however, forgetting that the unlawfulness of the continued interrogation is the question and not the answer, and unable to discern that no one factor in *Mosley* rendered continued interrogation unlawful, the court overreacted and re-

quired fresh warnings upon re-interrogation if the suspect previously invoked his right to remain silent. 103 N.J. at 267, 511 A.2d at ___. A rigid rule replaced careful thought as the court erroneously created a *per se* test for waivers of federal, constitutional rights and spurned this Court's time-tested standard in *Zerbst*.

The New Jersey Supreme Court's *per se* rule does not at all help to achieve *Miranda*'s laudable goal. After all, if a suspect does not understand rights he accidentally invokes, repeating those rights will not help him understand them. Similarly, if a suspect does understand his rights (and respondent, for example, said that he did when they were initially read to him), repeating those rights before reinterrogation will not help the suspect understand them any better. Indeed, repeated reminders by police officers that a suspect need not speak may well dull the value of the warnings. Thus, the supreme court's *per se* rule works two evils: it emphasizes the form of the uttering instead of the substance of the utterance, and, worse, it removes the very protection which *Miranda* tried to guarantee, by taking from a suspect his right to choose. See *Mosley*, 423 U.S. at 108-109 (White, J. concurring).

We surmise that the New Jersey Supreme Court strayed because in its view, whether a suspect's invocation of his right to remain silent was "scrupulously honored" is an independent question, unrelated to anything else. In reality, of course, whether a suspect's invocation of his right to remain silent was "scrupulously honored" is not an independent question, but is itself comprised of the totality of the circumstances. Although in any given case some cir-

cumstances may outweigh others, their sum total never changes.

We are suggesting, in essence, that this Court adopt a balancing test, analogous to the one promulgated in *Barker v. Wingo*, 407 U.S. 514 (1972), as a way to determine whether a suspect's invocation of his right to remain silent was scrupulously honored. Under such a standard, for instance, respondent's being questioned about the same crime after a hiatus might less indicate a knowing waiver than Mosley's being questioned about the same crime after a hiatus.[7] On the other hand, even if we assume that that distinction is meaningful, then respondent's having been warned formally eight times, reminded twice more, and warned informally twice more again would easily more indicate a knowing waiver than Mosley's having been warned merely twice. Different routes would thus bring different judges to the same destination: admissibility.

In our view, the instant case gives to this Court the chance to remind state courts that while *Mosley* may have been a fact-sensitive decision, it was not an arbitrary decision. It was not a signal to state courts to require any reinterrogation to address a different offense. It was not a signal to state courts to require police officers to wait a minimal period of time before they recommence interrogation. Most certainly, it was not a signal to state courts to require

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[7] We emphasize, incidentally, that even the New Jersey Supreme Court did not read *Mosley* to forbid reinterrogation about the same offense. Rather, only the officers' failure to administer fresh *Miranda* warnings required the suppression of respondent's confession.

police officers to repeat mindlessly a fresh set of *Miranda* warnings before an eight-time-warned suspect was reinterrogated.

Mosley gave an inch to the New Jersey Supreme Court, which immediately took a mile. A reminder to state courts that they must apply, and not modify, this Court's decisions, would help insure that aberrations like *Hartley*, or *Butler* before it, would disappear.

B. THIS COURT CAN NOT ALLOW THE NEW JERSEY SUPREME COURT TO FLOUT THIS COURT'S DECISIONS IN *FARE v. MICHAEL C.* AND *CALIFORNIA v. PATRICK STEVEN W.* AND TO FIND AN INVOCATION OF THE RIGHT TO REMAIN SILENT WHERE THIS COURT HAS ALREADY RULED THAT NONE EXISTS.

Immediately after respondent admitted committing the Schnaps murder, he asked to see his father. Specifically, respondent told Detective Rizzo that respondent would explain how he killed Schnaps, but he wanted initially to see his father and tell him the news before he learned it from the newspapers. The New Jersey Supreme Court concluded that respondent's request was an unequivocal invocation of his right to remain silent. 121 N.J. at 419, 581 A.2d at ___ (App. A at 10).[8] In our view, this decision

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[8] The supreme court never mentioned respondent's articulated justification; it merely recited earlier testimony by Rizzo that "'[respondent] would tell [the officers] about the murder but he first wanted to speak to his father.'" (App. A at 7). We would be less than candid were we to fail to note that Rizzo's "newspaper" testimony was adduced at trial (T10/2/86 at 115-16), while the statement quoted by the court was uttered at the pre-trial hearing to determine the admissibility of the confession. (T9/15/

constituted yet another *per se* rule which flouts decisions of this Court.

This Court has observed that courts may consider a suspect's request to consult a probation officer when deciding the voluntariness of a confession. *Michael C.*, 442 U.S. at 724. In the instant case, however, the New Jersey Supreme Court found no evidence of "police coercion or misconduct," or of "extended interrogations designed to wear down [respondent's] will." 121 N.J at 418. 581 A.2d at ___ (App. A. at 9). Therefore, the court necessarily viewed respondent's request as something which in and of itself required the officers to cease their questioning.[9] This position violates *Michael C.*

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86 at 14). In New Jersey, decisions about the admissibility of evidence must be based upon the evidence adduced at the pretrial hearing, see *State v. Jordan*, 115 N.J. Super. 73, 278 A.2d 223 (App. Div. 1971), certif. den. 59 N.J. 293, 281 A.2d 806 (1971), but it is clear that in this case the trial court knew from that evidence the reason for respondent's desire to tell his father the news. Thus, Rizzo wrote an investigation report describing respondent's wish that his father not discover respondent's involvement through other sources, and the trial court had this report, which had been appended to a trial brief. (T9/15/86 at 81). Moreover, defense counsel's question to Investigator Nelson Baez presupposes that respondent had a specific reason to see his father. (T9/15/86 at 66).

In any event, this Court has the right to find facts independently. *Mincey v. Arizona*, 437 U.S. 385 (1978). We are confident that if the need to resolve a factual dispute arises, this Court will find that respondent's desire to see his father precisely reflected his willingness to confess and his certainty that his confession would be given to the press.

[9] The court likened this case to *Law v. State*, 21 Md. App. 13, 318 A.2d 859 (Ct. Spec. App. 1974), in which police officers badgered a wounded suspect. The court failed to note, however,

In *Michael C.*, this Court specifically rejected a claim that "a request by a [suspect] to speak with his probation officer constitutes a *per se* request to remain silent." 442 U.S. at 723. Lest respondent claim, however, that he asked to see his father rather than a probation officer, we emphasize that this change in personnel scarcely alters the result. This Court's remand in *Patrick Steven W.* of *In re Patrick W.*, 84 Cal. App.3d 520, 148 Cal. Reptr.735 (Ct. App. 1978), surely implies, if it does not indeed hold, that a request to consult a parent (in that case, Patrick W.'s mother) cannot be a "*per se* request to remain silent." The supreme court's distortion must be corrected.[10]

C. THIS COURT CANNOT ALLOW STATE COURTS TO DISTORT SETTLED FEDERAL PRINCIPLES YET ESCAPE THIS COURT'S REVIEW SIMPLY BY MAKING A NAKED DECLARATION THAT THE DISTORTION IS PREDICATED UPON AN INDEPENDENT AND ADEQUATE, STATE GROUND.

Before we conclude, we would be remiss were we not to recognize that *State v. Hartley*, which supports

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that Maryland's highest court has much more recently specifically held that a request by a suspect to see a parent is not *per se* an invocation of the right to silence. *McIntyre v. State*, 309 Md. 607, 566 A.2d 30 (1987).

[10] While this Court certainly does not need our assurance that it decided *Michael C.* or *Patrick Steven W.* correctly, we note that the result in the instant case is illogical. Neither New Jersey law nor federal law privileges what a child tells a parent. Thus, the New Jersey Supreme Court's decision has the bizarre effect of forbidding the police officers to address respondent, but permitting them, as soon as respondent finished his meeting with his father, to ask respondent's father what respondent said. Such a result hardly advances the goals of the Fifth Amendment.

the instant decision, purports to invoke state law independently. As we shall show, no independent, state law supports *Hartley*, and this Court is free to review and reverse this injustice.

In *Michigan v. Long*, 463 U.S. 1032, 1041 (1983), this Court told state courts precisely how to avoid this Court's review: a state court should "make clear by a plain statement in its judgment or opinion that [any cited] federal cases are being used only for the purpose of guidance and do not themselves compel the result that the court has reached." Moreover, this Court promised "not [to] undertake to review the [state court's] decision" if that decision "indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds." *Id.*

Since *Long*, this Court has kept its promise. In not one case has this Court acknowledged the existence of the requisite, "plain statement" only to ignore it. Rather, this Court has specifically emphasized the absence of the "plain statement" when it has rejected a claim that the state court decision rests upon an adequate and independent, state ground. *E.g.*, *Maryland v. Garrison*, 480 U.S. 79, 83-84 (1987); *New York v. P.J. Video, Inc.*, 475 U.S. 868, 872 n.4 (1986).

Nevertheless, this Court in *Long* surely did not mean to instruct state courts how to evade this Court's review. Surely, this Court did not intend the pronouncement of the "plain statement" to be an incantation which would preclude this Court's review even if the "plain statement" were untrue. Surely, this Court was signaling its intention to honor the "plain statement" only if it was "bona fide," and in the instant case it was not. In the instant case, the

New Jersey Supreme Court has perverted purely federal principles, certain that it has previously uttered the incantation correctly. It has not.

The New Jersey Supreme Court did not explain why it concluded that respondent's confession must be suppressed. Rather, it held initially that respondent's request to see his father was an unequivocal invocation of his right to remain silent Then, the court simply followed the "'bright-line' rule" of *Hartley*, and held that "[w]hen a defendant seeks to terminate an interrogation, the police must at a minimum give fresh *Miranda* warnings before recommencing questioning." 121 N.J. at 420, 581 A.2d at ___ (App. A at 11, citation omitted).

The New Jersey Supreme Court recognized that *Hartley*'s " 'bright-line' minimum requirement of renewed warnings," 103 N.J. at 268, 511 A.2d at ___ , distorted a federal principle. *Id.*, at 284-285, 511 A.2d at ___ . Indeed, the court even "acknowledge[d] that it may be wrong." *Id.* at 285, 511 A.2d at ___ . Consequently, the court alternatively resolved "to settle [the question] as a matter of state law." *Id.* Heeding this Court's admonition to state courts in *Long*, the court "expressly" decided that New Jersey's common law required "authorities [to] cease interrogation of a suspect on his request and [not to] resume until a new set of [*Miranda*] warnings has been given." 103 N.J. at 284-287, 511 A.2d at ___ .[11]

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[11] We would not want our interpolation of *Miranda* in brackets to lead this Court to wonder whether the New Jersey Supreme Court contemplated some state variant instead of the warnings required by this Court in *Miranda*. The court in the instant case twice explained that *Hartley* specified *Miranda* warnings. 121 N.J. at 420, 422, 581 A.2d at ___ . (App. A at 11, 12).

The threshold issue is thus clear. If indeed the instant reversal is garbed in an independent and adequate, state ground, then this Court has no jurisdiction. If, however, only a naked claim of an independent and adequate, state ground underlies this reversal, then the pertinent law is federal, and this Court has jurisdiction.

We suggest that the emperor is wearing no clothes; that *Hartley's* articulated, independent and adequate, state ground is merely a pretext designed to insulate from federal review the court's distortion of a purely federal issue. As we shall show, the purportedly independent and adequate, state ground is so closely "interwoven with the federal law," *Long*, 463 U.S. at 1040, as to present only a federal question.

Preliminarily, we pause to note that the New Jersey Supreme Court can require police officers to issue *Miranda*-type warnings as a matter of state law. The court could find the justification for that requirement in, for example, the state's common law or in some notion of fundamental fairness. *See, e.g., State v. Tropea*, 78 N.J. 309, 316, 394 A.2d 355 (1978). The court, however, has yet to require independently based, *Miranda*-type warnings. Rather, the court's proclamations to the contrary notwithstanding, the court simply incorporated into its common law this Court's decision in *Miranda* and then improperly twisted it.

The New Jersey Supreme Court in *Hartley* admitted that the case involved federal law: it specifically noted that its decision "implicated" "federal-constitutional rights." 103 N.J. at 286, 511 A.2d at ___. Indeed, the court in the instant case noted that *Hartley* was decided "'primarily'" upon federal, constitutional law, 121 N.J. at 423, 581 A.2d at ___ (App.

A at 14), and applied only federal principles of retroactivity to demonstrate why *Hartley* should govern the instant case. 121 N.J. at 422-423, 581 A.2d at _ (App. A at 13).[12] Plainly, the court cannot by the pronouncement of any formula forbid this Court to review the court's resolution of the federal issue concededly in the case.

Moreover, the court's efforts to wrap its conclusion in the mantle of state, common law cannot prevail. The privilege against self-incrimination may well have been "an integral thread in the fabric of New Jersey common law since our beginnings as a state," 103 N.J. at 286, 511 A.2d at ___, but issuing *Miranda*-type warnings has never been a part of the privilege. Rather, the common-law rule in New Jersey had long been that police officers were not obligated to issue *Miranda*-type warnings, and the failure of police officers to issue such warnings did not render confessions inadmissible. *State v. Ordog*, 45 N.J. 347, 212 A.2d 370 (1965), *cert.* den. 384 U.S. 1022 (1966); *State v. Blanchard*, 44 N.J. 195, 207 A.2d 681 (1965); *State v. Reynolds*, 41 N.J. 163, 195 A.2d 449 (1963), *cert.* den. 377 U.S. 1000 (1964); *State v. White*, 27 N.J. 158, 142 A.2d 65 (1958); *State v. Wise* 19 N.J. 59, 99, 115 A.2d 62 (1955); *State v. Cooper*, 10 N.J. 532, 92 A.2d 786 (1952); *State v. Pierce*, 4 N.J. 252, 72 A.2d 318 (1950); *State v. Hernia*, 68 N.J.L. 299, 53 A. 85 (E. & A. 1902). Indeed, the New Jersey Supreme Court's resolve to follow this aspect of the common law was so firm that in *Blanchard* the court enunciated an unwillingness to abandon the rule "in

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[12] The irony of applying federal, retroactivity analysis did not escape Justice Stein. See 121 N.J. at 439-440, 581 A.2d at ___ (Stein, J., dissenting in part) (App. A at 31-32).

the absence of a clear expression to the contrary" by this Court. 44 N.J. at 209, 207 A.2d at ___. This clear expression, of course, came in *Miranda*.

We thus see that the particular bolt of the common law examined in *Hartley* was actually woven from a federal thread. Such an observation should scarcely be surprising, because even the supreme court conceded that federal precedents served as the loom upon which the fabric of the state's common law of self-incrimination was woven. 103 N.J. at 286, 511 A.2d at ___ ("The voluntariness of confessions has consistently been tested in this state under common-law principles, albeit principles often expanded or altered in response to federal constitutional decisions.").

The instant case plainly demonstrates that *Hartley's* reliance upon an independent and adequate, state ground is a sham. The court suppressed the confession in the instant case because *Hartley* requires police officers to administer "fresh *Miranda* warnings before recommencing questioning." 121 N.J. at 420, 581 A.2d at ___ (App. A at 11). *Miranda* warnings, however, have only one source: this Court's interpretation of the Fifth Amendment. Because the New Jersey Supreme Court has admitted that the administration of these federal-constitutionally required warnings will safeguard the state's common-law right against self-incrimination, no independent and adequate, state ground supports *Hartley* or the instant reversal. *International Longshoremen's Association, AFL-CIO v. Davis*, 476 U.S. 380, 388 (1986).

CONCLUSION

The societally counterproductive results of *Hartley*'s inflexible rule are nowhere clearer than in the

instant case. Something is fundamentally wrong when eight complete recitations of *Miranda* warnings, two more reminders by police officers, and two explanations by judges at arraignments of the right to counsel and the right to silence have been deemed as a matter of law insufficient to enable respondent to know and assess his constitutional rights, notwithstanding the conceded absence of physical and psychological pressures. Such a legal inability to waive the right to remain silent was rejected in *Butler*, and surely cannot be what *Miranda* and *Mosley* envisioned.

This Court, we are confident, recognizes that the New Jersey Supreme Court, in its efforts to suppress this vicious murderer's freely given confession, spurned this Court's holdings and endeavored to alter federal, constitutional law, all the while pretending to clothe its decision in the material of state law. We urge this Court to grant *certiorari*, restore the confession, and remind the New Jersey Supreme Court that this Court alone will interpret federal, constitutional requirements.

Respectfully submitted,

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January 1991 **Counsel of Record*

APPENDIX

APPENDIX A

NEW JERSEY SUPREME COURT

A-85

[121 N.J. 407]

STATE OF NEW JERSEY,
Plaintiff-Respondent,

v.

NATHANIEL HARVEY,
Defendant-Appellant.

Argued March 27, 1990—Decided October 18, 1990

Edward A. Kopelson and *Robert D. Westreich*, Designated Counsel, argued the cause for appellant (*Thomas S. Smith, Jr.*, Acting Public Defender, attorney).

Lisa Sarnoff Gochman, Deputy Attorney General, argued the cause for respondent (*Robert J. Del Tufo*, Attorney General of New Jersey, attorney).

The opinion of the Court was delivered by CLIFFORD, J.

Defendant, Nathaniel Harvey, appeals from a capital-murder conviction and death sentence. Because the trial court's jury instructions at the guilt phase did not comply with our later holding in *State v. Gerald*, 113 *N.J.* 40 (1988), we reverse the conviction and remand for a new trial.

I

- A -

After Irene Schnaps failed to appear for work on June 17, 1985, a colleague went to her apartment at the Hunt-

er's Glen complex in Plainsboro. When no one answered, he entered through the unlocked door and found Schnaps dead on the bedroom floor. She had suffered severe head and facial wounds.

The police found an empty box for a Seiko LaSalle watch on the dressing table in the bedroom. An empty camera box was in the closet, and an open purse sat atop the vanity in the bathroom. A pillowcase had a bloody sneaker print bearing a chevron design and the letters "PON." There were no signs of forced entry; the sliding glass door was closed but unlocked.

Dr. Martin Shuster performed an autopsy. He concluded that Schnaps had suffered numerous skull fractures, a fractured jaw, and a deep laceration on her skull. Dr. Shuster believed that she had been struck at least fifteen times with a blunt object. Pressure applied to her neck for an hour had caused contusions. In Dr. Schuster's opinion, a brief interval separated the first blow and death. He could not determine which blows had been fatal and which had been inflicted after the victim's death.

- B -

On October 28, 1985, the police arrested defendant on suspicion of kidnapping and burglary. Following several interrogations over the next three days, defendant admitted that he had killed Irene Schnaps. He said that on June 16 he had gone to the Hunter's Glen apartment complex. Entering Schnaps' apartment through an unlocked patio door, he went into the bedroom, where he took a watch and some jewelry from the dresser. Schnaps, who had been sleeping, woke up and punched him in the nose, causing it to bleed. Defendant then struck her in the head with a "hammer-like" object, knocking her to the ground. Afraid that the blood from his nose had stained the sheets, he replaced them with clean ones from the closet. He then retrieved a towel from the bathroom and wiped the blood

off of Schnaps' body. After collecting the bed sheets, the towel, the watch, a camera, and other pieces of jewelry, he left the apartment.

A jury convicted defendant of the knowing and purposeful murder of Irene Schnaps, felony murder, first-degree robbery, and second-degree burglary. Following a penalty-phase proceeding on the capital-murder conviction, the trial court sentenced defendant to death.

II

We first consider defendant's contention that the trial court's failure to instruct the jury separately for the crimes of knowingly or purposely causing death (intentional murder) and of knowingly or purposely causing serious bodily injury resulting in death (serious-bodily-injury murder) requires reversal of his conviction. In *State v. Gerald*, *supra*, 113 *N.J.* at 69, we held that a person who is convicted of serious-bodily-injury murder under *N.J.S.A.* 2C:11-3(a)(1) or (2) may not be sentenced to death. If the evidence provides a rational basis for a jury to convict a defendant of either intentional or serious-bodily-injury murder, the trial court "must instruct the jury to specify which, if [either], of those findings forms the basis for a conviction." *State v. Coyle*, 119 *N.J.* 194, 209 (1990).

In arguing that there was no rational basis for a finding of serious-bodily-injury murder, the State points to the medical evidence suggesting that the victim had been hit fifteen times in the head with a blunt instrument and that her neck had been squeezed for an hour. The victim's jaw was broken. Defendant confessed that he had hit her with a "hammer-like object."

Of course, such repeated blows can support a jury finding of intentional murder. However, the issue here, as in other pre-*Gerald* capital cases, is whether that *was* the jury's determination. The jury was not asked to distinguish between intentional murder and serious-bodily-injury mur-

der. Its verdict did not indicate which of the two it found to apply to this case. Although it might seem probable that the jury had intentional murder in mind, the question is whether there is a rational basis in the evidence on which the jury, if instructed to distinguish between the two, might return a verdict of serious-bodily-injury murder. If there is, then the jury, as the finder of fact, must decide the matter. An appellate court cannot.

The State conceded that defendant's initial intent was to commit burglary, not murder. Defendant confessed that he had struck the victim only once, in response to being hit in the nose. That evidence suggests that defendant may have intended only to injure the victim, not to kill her. We note too that while arguing for purposes of the *Gerald* issue that the number of blows inflicted unquestionably establishes an intention to kill, the State claims for penalty-phase purposes that the first blows were intended to injure and inflict pain before death rather than to kill. See *infra* at 434 (discussion of c(4)(c) aggravating factor).

The jury was free to reject the pathologist's testimony and accept the other evidence that indicated a lack of murderous intent. *See State v. Crisantos (Arriagas)*, 102 *N.J.* 265, 273 (1986) (a jury has "the power to disregard even overwhelming proof"). This was not merely a one-issue case requiring the jury to determine only whether defendant had in fact been the one who had inflicted the intentionally-fatal blows. The mental state of the perpetrator was also clearly in issue here. The trial court instructed the jury not just on capital murder, but also on felony-murder, aggravated manslaughter, and manslaughter. Obviously, then, the trial court believed the evidence would allow the jury rationally to convict on one of those counts while acquitting defendant on capital murder. A rational jury could have concluded that defendant inflicted the fatal blows but had not intended to kill. The determination of whether defendant had the *mens rea* necessary to permit the State to put him to death is quintessentially

one that our system of law entrusts to juries. All mental states related to the law of homicide were developed over a long period of history for the purpose of distinguishing capital murders from others. Wechsler & Michael, "A Rationale of the Law of Homicide I," 37 *Colum. L. Rev.* 701 (1937). Determining a defendant's mental state is the special function of the jury, not of this Court.

The record provided "a rational basis for the jury to find that the defendant intended to cause only serious bodily injury." *State v. Coyle, supra*, 119 *N.J.* at 209. Because the trial court understandably failed to anticipate *Gerald* and did not instruct the jury to distinguish that offense from intentional murder, we reverse defendant's capital-murder conviction.

III

We turn not to those alleged errors that might arise again at retrial.

- A -

Defendant argues that the trial court should have suppressed his confession. He claims that on five occasions he asserted his right to remain silent, but that the police did not "scrupulously honor" his invocations. *See Michigan v. Mosley*, 423 *U.S.* 96, 103-04, (1975). Defendant contends that the police violated the bright-line test adopted in *State v. Hartley*, 103 *N.J.* 252 (1986), by not re-informing him of his *Miranda* rights after each invocation of his right. He also alleges that his confession was not voluntary.

- 1 -

The police arrested defendant at about 7:30 a.m. on October 28, 1985. When they reached the station an hour later, the police read the *Miranda* warnings to defendant, who then signed a rights form. The police did not question him that morning.

At 3:37 that afternoon, Sergeant Hibbs and Detective Swanhart began interrogating defendant. They again gave *Miranda* warnings to defendant, who signed another rights form. After eliciting personal information from defendant, the police started asking him about other crimes. At about 4:10 p.m. they questioned him about the Schnaps murder. Defendant denied responsibility, began to cry, and "asked for time to think, he wanted time by himself * * *." The questioning ceased and the police returned defendant to his cell. Forty minutes later the police brought defendant back to the interrogation room. On the way an officer "reminded" him of his rights but did not issue the formal *Miranda* warnings. When the police asked defendant about the Schnaps murder, he again began crying and said: "[B]efore I talk or say anything else I want to talk to my mother-in-law Pearl Thomas."

Thomas arrived at the station an hour later and spoke with defendant for five minutes in his cell. At 7:30 p.m. the police took defendant back into the interrogation room. They gave him no *Miranda* warnings or reminders. When the police broached the Schnaps murder at 8:00 p.m., defendant again began to cry and said that he "just didn't do anything." According to one of the officers, the questioning then ended, "not at his request or our request, it was a mutual thing." Defendant was returned to his cell.

Fifteen minutes later defendant asked to speak with Detective Swanhart alone. Swanhart "reminded" defendant of his rights and talked to him for an hour and a half. Defendant did not admit killing Irene Schnaps but he did confess to other crimes.

Around midnight a detective from the prosecutor's office spoke to defendant about the murder. He orally advised defendant of his *Miranda* rights. The interview lasted only a couple of minutes, and defendant did not give a statement.

The next morning, October 29, two officers took defendant for a one-hour car ride to the scenes of the crimes he had admitted the night before. No *Miranda* warnings were given.

At defendant's arraignment that day for offenses unrelated to the Schnaps murder, the municipal court did not ask him if he had or desired an attorney. That afternoon defendant was read his *Miranda* rights and signed a rights form. During the interrogation he consented to searches of his room and car. The search of the car turned up a Seiko LaSalle watch, later identified as having belonged to Schnaps' deceased husband.

That night the police interviewed defendant in a holding room at the jail. After reading defendant his *Miranda* rights, the police told him that they had found the watch in his car. Defendant "responded as if talkin' to himself, he said, oh, not in the car, he said no, no, not in the car." Defendant again denied involvement in the Schnaps murder.

The next day, October 30, defendant was arraigned in Superior Court for the murder of Schnaps. At about 10:00 that morning, after reissuing defendant his *Miranda* rights, the police started questioning him about the Schnaps murder. Shortly after 11:00 a.m., defendant informed the officers that "he would tell [them] about the murder but he first wanted to speak to his father." Questioning ceased, and arrangements were made to transport defendant's father to the jail. Defendant had lunch and talked to the officers about "things in general." At 2:15 p.m. defendant went to the prosecutor's office, where he spoke with his father for fifteen minutes before returning to jail.

At 2:30 p.m. the interrogation resumed without new *Miranda* warnings or reminders. Defendant confessed having killed Schnaps. The police took him back to the prosecutor's office for a formal statement. When they read

him his *Miranda* rights, defendant demanded an attorney. Questioning ceased.

- 2 -

Defendant claims that he asserted his right to silence four times on October 28, two days before his confession: at the 3:30 p.m. interrogation when he asked for "time to think * * * by himself"; at the 5:00 p.m. interrogation when he asked to speak to his mother-in-law; at 7:00 p.m. when he "asked for more time"; and at the 7:30 p.m. interrogation when he began to cry and said that he "just didn't do anything."

The only statement that defendant seeks to suppress is his confession of October 30. Because of the intervening events between the alleged invocations on October 28 and the confession, we need not decide whether defendant actually invoked his right to remain silent and whether the police scrupulously honored those alleged requests. Even if the police did not scrupulously honor defendant's alleged invocations of his right to silence, the confession was "sufficiently independent to dissipate the taint of their illegal conduct." *State v. Johnson*, 118 *N.J.* 639, 653 (1990).

The determination of whether a confession was the "fruit" of prior illegal police conduct involves three factors:

> (1) the temporal proximity between the illegal conduct and the challenged evidence; (2) the presence of intervening circumstances; and (3) the flagrancy and purpose of the police misconduct. [Ibid.]

None of those factors helps defendant. First, his confession was not "temporally proximate" to the alleged violations—it occurred two days later—nor did it follow a prolonged illegal detention. See *id.* at 653-55 (repeated constitutional violations during illegal ten-hour detention preceded defendant's escape).

Second, a number of intervening circumstances separated the alleged violations of October 28 from the confession. At 8:15 p.m. on October 28, after the fourth alleged invocation,defendant asked to speak with Detective Swanhart alone. Fresh *Miranda* warnings are not necessary if the accused initiates conversation after invoking the right to silence. *State v. Fuller*, 118 *N.J.* 75 (1990). Moreover, defendant was reminded of his rights at that time as well as later that evening. The next day he was arraigned before a municipal court judge. After receiving new *Miranda* warnings that afternoon, he signed a rights form. That evening he was read his rights again. The following day, October 30, he was arraigned a second time and received the *Miranda* warnings again.

Finally, there is not evidence of police coercion or misconduct. There were no extended interrogations designed to wear down defendant's will. Even if defendant had invoked his right to remain silent on October 28, any possible taint from the police's alleged failure scrupulously to honor his invocations was sufficiently dissipated.

The fifth time defendant allegedly invoked his right to remain silent was on October 30 when he asked to talk to his father. Although defendant indicated that he would talk about the Schnaps murder when questioning resumed, there was a significant break in the interrogation. Approximately three-and-one-half hours passed before the police resumed the interrogation. But what makes the interruption significant is not its length so much as its nature. The request here was qualitatively different from the one in *State v. Bey*, 122 *N.J.* 123, 139 (1988) (*Bey II*), in which the defendant "requested permission to lay down and to think about what happened." The Court likened that situation to one in which a defendant asks for "something to eat or drink, the use of toilet facilities, [or] the opportunity to stand and stretch * * * ." *Ibid.* Defendant's request here was not for a brief respite to satisfy physical

needs. Instead he was asking, after three days in custody, for the chance to consult with a close family member.

Defendant's request is similar to the one in *State v. Hartley, supra*, 103 *N.J.* at 258, in which the defendant told the police, "I don't believe I want to make a statement at this time." In both cases the defendant suggested that he would talk to the police later. "[A] request to terminate an interrogation must be honored 'however ambiguous.' " *State v. Bey*, 112 *N.J.* 45, 64 (1988) (*Bey I*) (quoting *State v. Kennedy*, 97 *N.J.* 278, 288 (1984)). Certainly the request here was no more equivocal than the one in *Bey I* in which, according to the police, the defendant had "indicated he did not want to talk * * about it * * * ." *Ibid.* Defendant's conduct during three days of interrogation and his refusal to answer questions about the Schnaps murder likewise indicated that he did not want "to talk about it."

This case also resembles *Law v. State*, 21 *Md.App.* 13, 318 *A.*2d 859 (1974), in which the police were questioning the wounded defendant as he lay handcuffed to his hospital bed. The defendant told the police that "he didn't want to talk any more until he was further treated." *Id.* at 36, 318 A.2d at 872 (emphasis deleted). Despite his request, the police continued to question him. The court held that the defendant's ensuing statement was inadmissible. Although the obvious difference from this case is that here defendant was not wounded, the court's decision in *Law* rested on the defendant's words, not on the surrounding circumstances. In both this case and *Law*, the defendants indicated that they would talk, but only after a subsequent condition had been met. In *Law* the condition was further treatment. Here the condition was a meeting with defendant's father. The implied intent to talk later does not change the fact, as the court found in *Law* and as we find here, that defendant sought to terminate the interrogation.

The importance of the police's failure to reissue *Miranda* warnings after defendant had met his father is clearly shown by what happened when the police finally did give him the warnings. After defendant had confessed orally, the authorities gave him new *Miranda* warnings before seeking to take a formal statement. Defendant immediately demanded an attorney before any statement could be reduced to writing. It is no stretch to imagine that defendant would have requested an attorney had the police given him warnings when they first interrogated him after he had met with his father.

The mandate of *State v. Hartley, supra*, 103 *N.J.* 252, is clear. When a defendant seeks to terminate an interrogation, the police must at a minimum give fresh *Miranda* warnings before recommencing questioning. *Id.* at 256. Any statement made prior to the new warnings must be suppressed. We pause to observe that although our dissenting colleagues Justice Stein readily acknowledges," *post* at 444, nevertheless he concludes—contrary to the unmistakable language of *Hartley*'s "bright line" rule, see 103 *N.J.* at 267—that "the resumption of interrogation [thereafter] did not constitute a failure by the police to 'scrupulously honor' defendant's right to remain silent." *Post* at 444. Either defendant exercised his right (as we and Justice Stein conclude), or he did not (as Justice O'Hern concludes). If he did, then without question *Hartley* requires the readministering of *Miranda* warnings before the resumption of interrogation.

We apply the *Hartley* rule even though that rule was announced after the interrogation in this case had occurred. Retroactivity is not a consideration here. "The threshold question in any retroactivity decision is whether a new rule of law has actually been announced." *State v. Burstein*, 85 *N.J.* 394, 403 (1981). The issue of retroactivity "never arises absent a new rule of law * * * ." *State v. Lark*, 117 *N.J.* 331, 344 (1989) (Clifford, J., concurring in judgment).

Hartley did not announce a new rule of law. It was "not a clear break with the past, but a simple extension of the principle of cases * * * holding that the State must honor 'a defendant's request—however ambiguous—to terminate interrogation.' " *Bey II, supra*, 112 *N.J.* at 213 (Handler, J., dissenting) (quoting *State v. Kennedy*, 97 *N.J.* 278, 288, (1984)). We said that our rule in *Hartley* was "sound as a matter of New Jersey common law [and] consistent with the spirit of the Supreme Court's decisions * * * ." *State v. Hartley, supra*, 103 *N.J.* at 268. The foundation of our decision was *Michigan v. Mosley, supra*, 423 *U.S.* 96, in which the Supreme Court held that the police had "scrupulously honored" the defendant's decision to remain silent because they did not approach him for two hours, they gave him fresh *Miranda* warnings, a different officer questioned him, and the questioning concerned a different offense from the one for which he was in custody. Although the Supreme Court did not indicate which of those elements are essential for a finding that the police "scrupulously honored" a suspect's rights, we held that the furnishing of fresh *Miranda* warnings is "indispensable." *State v. Hartley, supra*, 103 *N.J.* at 267.

In reaching that conclusion, we relied on the decisions of other courts as well as academic literature. See, *e.g.*, *Wilson v. United States*, 444 *A.*2d 25, 31 (D.C. 1982) (all *Mosley* factors are required to validate reinterrogation); *People v. Young*, 115 *Ill.App.*3d 455, 71 *Ill.Dec.* 259, 450 *N.E.*2d 947 (1983) (recess and fresh *Miranda* warnings are a minimum prerequisite to reinterrogation); Kamisar, "The *Edwards* and *Bradshaw* Cases: The Court Giveth and the Court Taketh Away," 5 *The Supreme Court: Trends and Developments 1982-83* 153 (1984) (fresh *Miranda* warnings are necessary for renewing questioning after suspect has indicated desire to remain silent).

Because *Hartley* did not announce a new rule of law, retroactivity is not an issue. Any defendant who had not exhausted direct appeals when *Hartley* was decided could

have asserted a claim based on that opinion. Because the police did not give defendant fresh *Miranda* warnings after he had indicated his desire to remain silent, *Hartley* requires that the ensuing confession be suppressed.

Moreover, even if *Hartley* did create a new rule of law, it would still apply here under *either* the Supreme Court's old analysis of retroactivity of new criminal procedure rules or its more recent pronouncement on retroactivity in *Griffith v. Kentucky*, 479 *U.S.* 314, (1987). Under its former analysis, the Supreme Court held that *Miranda* itself applies to interrogations that took place before that rule was announced if the trial did not commence until after the *Miranda* decision (precisely the sequence in this case), see *Michigan v. Tucker*, 417 *U.S.* 433, 447, (1974), but not if the case was tried before that decision, *Johnson v. New Jersey*, 384 *U.S.* 719, 733, (1966). The obvious similarity between the nature and effect of *Miranda* and *Hartley* suggests that the application of *Hartley* should be no less broad.

Turning to the Supreme Court's most recent retroactivity pronouncements, we note first that Justice Stein correctly points out, *post* at 439, that " '[t]o the extent that retroactivity issues arise in the context of criminal-procedure decisions implicating rights guaranteed under the federal constitution, United States Supreme Court precedents control the scope of retroactivity,' " (citing *State v. Lark*, 117 *N.J.* 331, 335 (1989)), and that under *Griffith v. Kentucky*, 479 *U.S.* 314, (1987), "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." 479 *U.S.* at 328, *see State v. Stever*, 107 *N.J.* 543, 548-53 (1987) (discussing Supreme Court's development of retroactivity principles). Clearly, then, *Griffith* mandates adherence to a *Hartley* analysis in this case. Justice Stein would avoid application of *Griffith*'s sound principle, however, on

the ground that *Hartley* was not based "primarily" on federal-constitutional law, *post* at 425. Whatever "primarily" means in the foregoing context, our distinguished colleague is quite wrong

First, it is abundantly clear that *Hartley* was grounded at least as much on the fifth amendment to the United States Constitution as it was on New Jersey's common-law privilege, codified in our Evidence Rules. No fewer than sixteen times does the opinion refer specifically to its "constitutional" basis. For example, we emphasized at the outset of *Hartley* that our decision was founded not only on state law but "on our understanding of the United States Supreme Court precedents in this area." *State v. Hartley, supra*, 103 *N.J.* at 256. And: "[T]he failure to readminister *Miranda* warnings was a violation of the obligation scrupulously to honor Hartley's asserted right to silence, and therefore amounted to a violation of defendant's fifth-amendment and state common-law right not to be compelled to be a witness against himself." *Id.* at 278. And: any statement obtained in violation of *Hartley's* "bright-line" rule is "unconstitutionally compelled, and hence inadmissible, as having been obtained in violation of the fifth amendment and of the state common-law right against self-incrimination." *Id.* at 279. And finally: "[T]he failure scrupulously to honor Hartley's previously-invoked right to silence was a violation of constitutional magnitude * * * ." *Id.* at 283.

Second, one need look no further than Justice Stein's own opinion for the Court in *Bey I, supra*, 112 *N.J.* 45, for confirmation of the federal-constitutional basis of *Hartley*: "As in *Hartley* * * * we base our analysis [of whether the police had scrupulously honored Bey's right to cut off questioning] on both federal constitutional law and our State common-law privilege against self-incrimination." *Id.* at 63 (citing *Hartley, supra*, 103 *N.J.* at 284). And: "*Hartley* held that where the failure scrupulously to honor a suspect's right to cut off questioning results from the ab-

sence of fresh *Miranda* warnings before resuming questioning, the illegality renders the suspect's subsequent inculpatory statement *unconstitutionally* compelled as a matter of law." *Id.* 112 *N.J.* at 71 (emphasis added).

Note too that in *Bey* the interrogation occurred in May 1983 and the trial court heard the motion to suppress Bey's confession late in that same year. This Court decided *Hartley* in July 1986 and *Bey I* more than two years later, in August 1988. No one even "suggest[ed] that *Hartley* [did] not retroactively apply to the facts of [*Bey I*]," see 122 *N.J.* at 67 n.11—and properly so: we were simply applying *Hartley* to a case that had been on direct appeal when *Hartley* was decided. See *id.* at 58-74. Likewise, in *Bey II*, *supra*, 112 *N.J.* 123, this Court engaged in a full discussion of the *Hartley* principle, see *id.* at 134-43, prompting two dissents on the issue of the admissibility of the defendant's confession under a *Hartley* analysis, see *id.* at 184-88. There was no necessity to discuss or rule on any question of *Hartley*'s retroactivity, because the parties and the Court assumed, again correctly, its applicability. No more was it an issue there than it is here. And if *Hartley* applied in the *Bey* cases, on appeal when *Hartley* was decided, *a fortiori* it applies when, as here, the trial began after the *Hartley* opinion had been published.

Finally, Justice Stein overestimates *Hartley*'s impact ("a multitude of post-conviction-relief applications," *post* at 442,on cases such as this, which were tried after *Hartley* had been decided. *Griffith* would limit retroactive application to cases "in the pipeline"—those on appeal when *Hartley* was decided, in which the Hartley point had been raised—and would not affect cases that had gone to final decision before *Hartley*. We suspect the number is minimal; and in any event the burden is not more than the criminal-justice system should be asked to bear.

We hold that the *Hartley* rule bars the introduction of defendant's confession at retrial. We need not consider defendant's claim that his confession was involuntary.

- B -

Defendant objects to two statements made by the prosecutor during his opening. After describing the murder of Schnaps, the prosecutor told the jury:

> So, as you can see, this is a very important trial. It's important for Nathaniel Harvey. It's important for the family of the victim, and it's important to each and every citizen.

Later the prosecutor observed that Schnaps "was a recent widow, her husband having died six weeks * * * previously."

The prosecutor's comments were improper. They drew attention not to issues relevant to the crime charged but to the status of the victim and her family. His reference to her recent widowhood was "plainly designed to impassion the jury" and " 'contained[ed] nothing that would aid the jury in determining the defendant's guilt or innocence.' " *State v. Hightower*, 120 *N.J.* 378, 411 (1990) (quoting *State v. Williams*, 113 *N.J.* 393, 452 (1988)). On retrial the prosecutor must refrain from making such comments.

- C -

Defendant makes several objections to the testimony of four of the State's expert witnesses.

- 1 -

First, defendant argues that the trial court should not have qualified Dr. Claude Owen Lovejoy as an expert to testify about the bloody sneaker print found on the pillowcase. Dr. Lovejoy, a professor at Kent State University, received a doctorate in biological anthropology, which according to him is "the study of human form and function, evolution of the human species, human variation involving

anatomy, genetics, essentially the normal biology of man." His specialty is "the form and function and biomechanics of the lower limb." He claims to be able to estimate the stature of a person from the size of his or her shoes.

In October 1985 the police sent Dr. Lovejoy four photographs of the pillowcase containing a sneaker print. After having examined the pictures, Dr. Lovejoy concluded that the bloody print had been left by either a male of "short stature" or a female of "average to medium tall stature." The police then sent Dr. Lovejoy the actual pillowcase and three pairs of Pony hightop sneakers, marked in evidence as S-58, S-59, and S-60, two of which they said belonged to defendant's son. The professor immediately decided that neither S-59 nor S-60 had left the print, but was unsure about S-58. He then made a print with S-58 on a pillowcase stuffed with a pillow. Comparing that print to the one on Schnaps' pillowcase, Dr. Lovejoy concluded that it was "improbable" that S-58 had left the print.

The Pony Sneaker Company sent Dr. Lovejoy thirty-one pairs of sneakers from the same manufacturing run as S-58. The sneakers ranged in size from 7 to 11; none was 6, $6^1/_2$, or $7^1/_2$. The doctor took three measurements of the sole of each sneaker and plugged them into his "digitizer" to determine the size of the shoe that had left the print:

> Okay, what we did was we took * * * each of the individual shoes in the Pony sample, measured each of the dimensions that I've just talked about, put those into a data base, into a computer, along with shoe size and determined the relationship between those using a variety of statistical techniques.
>
> The simplest of those is called linear correlation and if one puts a set of dimensions, two sets of dimensions from the same object into the computer it will determine the degree of relationship between them, it will give you for example, the

> ability of one metric to predict the other with certain limits of reliability and that's what we mean by correlation and the strength of that physical relationship is expressed as varying from minus one through zero to plus one plus one being a perfect positive relationship, minus one being a perfect negative relationship.

Based on that analysis, Dr. Lovejoy concluded that the sneaker that had made the print was either a man's size $6^1/_2$, plus or minus one-half size, or a woman's size 8 to $8^1/_2$. The confidence limit of that conclusion was 95%, *i.e.*, the conclusion would be accurate within a one-half size 95% of the time. Deciding that hightop and lowtop sneakers have decorative stripes on different portions of the outer sole, he concluded that the sneaker was a hightop.

There are three requirements for the admission of expert testimony:

> (1) the intended testimony must concern a subject matter that is beyond the ken of the average juror; (2) the field testified to must be at a state of the art such that an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony. [*State v. Kelly*, 97 *N.J.* 178, 208 (1984).]

Comparison between a shoe print and the shoe alleged to have made that print does not require expert testimony. *State v. Johnson*, 120 *N.J.* 263 at 293-294 (1990). Nor is the proposition that shorter people tend to have smaller feet the stuff of expert testimony. It would be improper to use Dr. Lovejoy's professed expertise to bolster such testimony. However, to the extent that Dr. Lovejoy sought to establish with scientific reliability the size of the shoe and the height of the person that left the print, expert testimony was proper.

Concerning the second requirement for the admission of Dr. Lovejoy's expert testimony, there are three ways, in a relatively new field of research, to prove the evidence's "general acceptance and thereby its reliability":

> (1) by expert testimony as to the general acceptance, among those in the profession, of the premises on which the proffered expert witness based his or her analysis; (2) by authoritative scientific and legal writings indicating that the scientific community accepts the premises underlying the proffered testimony; and (3) by judicial opinions that indicate the expert's premises have gained general acceptance. [*State v. Kelly, supra*, 97 *N.J.* at 210.]

The State did not satisfy either the first or second alternative. It did not provide evidence that anyone in the scientific community other than Dr. Lovejoy himself vouches for his methods.

Nor do judicial opinions indicate that Dr. Lovejoy's methods have gained general acceptance. In *State v. Prudden*, 212 *N.J.Super.* 608 (App.Div. 1986), the same trial court that presided over these proceedings had qualified Dr. Lovejoy as an expert to testify about a sock print. Reversing on other grounds, the Appellate Division expressed reservations about the reliability of Dr. Lovejoy's methods. *Id.* at 617-18. Dr. Lovejoy also testified in *United States v. Ferri*, 778 *F.*2d 985 (3rd Cir. 1985), *cert. denied*, 476 *U.S.* 1172, (1986), to rebut the testimony of the government's footprint expert, who had compared one defendant's footprints with impressions inside shoes found at the crime scene and inside shoes seized from the defendants' residences. Notwithstanding *Prudden* and *Ferri*, we are unaware of any cases in which an expert's testimony involved the scientific comparison of sneaker prints with stature.

We also note several glaring weaknesses that cast doubt on the reliability of Dr. Lovejoy's conclusions. He admitted that he knew nothing about sneaker manufacturing or about the extent of variations from manufacturer to manufacturer or plant to plant. According to defendant, a Pony representative reported that the sneaker print had not even been made by a Pony. In conducting his analysis, Dr. Lovejoy used sneakers only from the same production series as that of S-58. Yet he had already determined that S-58 had not made the print. Nor was there any showing that the thirty-one pairs he measured were representative of the production run. Moreover, although he concluded within a 95% confidence limit that the shoe that had left the print was size $6^1/_2$, every shoe he examined from that production run was at least a size 7.

Because Dr. Lovejoy's methodology was not of sufficient scientific reliability, we need not consider the third requirement of whether he had sufficient expertise in the field. On retrial Dr. Lovejoy may not testify as an expert.

- 2 -

Theodore Mozer, a forensic chemist, testified as an expert on hair comparison. Mozer has worked for the New Jersey State Police for over fifteen years as a principal forensic chemist specializing in the analysis of human hairs in assault and homicide cases. He received a B.S. in biology and took graduate courses in chemistry. Mozer also took courses in the microscopy of human hair at the F.B.I. Academy in Virginia. A member of the International Committee on Hair Comparison, Mozer has examined hair samples in over 1,000 criminal cases and has testified as an expert in hair comparison between fifty and one-hundred times.

After analyzing seventy-five hairs found at the murder scene, Mozer determined that one of them was a black person's pubic hair that did not match Schnaps' hair. Com-

paring a hair sample from defendant, Mozer concluded that the hair had come either from defendant or from "[a]nother individual who had [the] same microscopic characteristics."

According to defendant, Mozer was not qualified on that subject because he was unfamiliar with a purported standard in the science of hair comparison that an expert must find fifteen to twenty cellular characteristics before an opinion can be deemed reliable. See, *e.g.*, *People v. Allweiss*, 48 *N.Y.*2d 40, 49, 421 *N.Y.S.*2d 341, 346, 396 *N.E.*2d 735, 740 (1979), and *People v. Watkins* 78 *Mich.App.* 89, 93-96, 259 *N.W.*2d 381, 384-85 (1977). At the *Rule* 8 hearing, Mozer admitted that he was unaware of such a standard but explained that the technique he used included analyzing "hundreds of different characteristics of these two hairs side by side and seeing whether or not they compare." Given Mozer's extensive experience in hair comparison, as established at the *Rule* 8 hearing, the trial court did not abuse its discretion in admitting him as an expert.

Defendant also claims that the State should not have been allowed to refer to the hair as a "pubic hair" because it conjures images of a sexual assault. We agree that the fact that the hair is a pubic hair is not relevant in this case. The important fact is that the hair might have come from defendant. Whether it might have come from his head, his chest, or his pubis is irrelevant in the absence of allegations of a sexual encounter. On retrial the prosecution should refrain from referring to the hair as a "pubic hair."

- 3 -

Defendant challenges the trial court's ruling that Philip Beesley was qualified to render an opinion regarding the percentage of blacks with a certain genetic marker in their blood. Beesley, an expert in forensic serology, analyzed four blood stains from Schnaps' apartment that did not

match the victim's blood but did match defendant's. He found that the four stains and a sample of defendant's blood all contained enzyme CAII, which is present only in blacks. Beesley testified that only 17.5% of the black population have CAII.

Defendant contends that Beesley was unqualified to testify about the percentage of the population that has CAII. In reaching that figure, Beesley relied in part on a State study of 337 blood samples taken from blacks. The study concluded that 17.5% of the black population in New Jersey have CAII. Beesley had not participated in that study and did not know how it had been conducted. Nor has that study ever been published and subjected to scientific scrutiny. His only basis for vouching for the study's reliability was that "[t]he person who did perform all that analysis and all that data knows a lot about statistics * * * ." The in-house study was an insufficient ground for Beesley to testify about the 17.5% figure.

Beesley, however, also relied on the *Source Book of Forensic Serology*, which states that CAII exists in 17.5% of blacks. If on retrial the State can show that that book and figure are considered authoritative in the forensic-serology community, it can introduce the figure through Beesley. *See Evid.R.* 56(2); *Mauro v. Owens-Corning Fiberglas*, 225 *N.J.Super.* 196, 206 (App.Div. 1988) (expert could testify about statistical data " 'of a type reasonably relied upon by experts' in the field of pulmonary disorder"), *aff'd sub nom. Mauro v. Raymark Indus.*, 116 *N.J.* 126 (1989).

Defendant also claims that the jury's consideration of statistical evidence quantified reasonable doubt and usurped its function of weighing the evidence. The argument is without merit. See *State v. King*, 215 *N.J. Super.* 504, 520 (App.Div. 1987) ("[s]imply because [a] figure is rather high is no reason to exclude it if the test procedure is a valid one").

Defendant contends that Dr. Shuster, who had conducted the autopsy of the victim, improperly testified about opinions that were not based on a reasonable degree of medical certainty or probability. For example, Dr. Schuster testified that the skull injury was 'possibly' two wounds or "possibly not." We need not delve into each part of Dr. Shuster's testimony. We merely instruct the trial court that on remand Dr. Schuster's ultimate "[m]edical expert testimony 'must be couched in terms of reasonable medical certainty or probability; opinions as to possibility are inadmissible.' " *State v. Freeman*, 223 *N.J.Super.* 92, 116 (App.Div. 1988) (quoting *Johnesee v. Stop & Shop Co.*, 174 *N.J.Super.* 426, 431 (App.Div. 1980)).

- D -

The trial court conducted a hearing to determine whether the State could impeach defendant's credibility with a prior conviction. The hearing centered on defendant's 1979 four-count conviction arising from a rape. Defendant was sentenced to a prison term of fifteen to twenty years. The record does not indicate when he was released. The trial court allowed the State to use the conviction for impeachment.

"The well-established rule in this jurisdiction is that admission of a prior conviction 'into evidence against a criminal defendant rests within the sound discretion of the trial judge.' " *State v. Pennington*, 119 *N.J.* 547, 586 (1990) (quoting *State v. Sands*, 76 *N.J.* 127, 144 (1978)). The defendant has the burden of showing that the conviction should be excluded. *Ibid.* "The key to exclusion is remoteness." *State v. Sands, supra*, 76 *N.J.* at 144.

The trial court here did not abuse its discretion in permitting the use of defendant's conviction for impeachment purposes. The conviction was only seven years old. More-

over, because defendant had been sentenced to a prison term of fifteen to twenty years, at the time of trial he must have been out of prison for less than seven years. Given the seriousness of his prior offenses, we see no reason to second-guess the trial court.

- E -

Defendant contends that the trial court improperly admitted sixty color photographs of the murder scene and of the victim's body. We do not rule on that challenge here but alert the trial court on remand to the standards set forth in *State v. Thompson*, 59 *N.J.* 396 (1971), and discussed in *State v. Johnson, supra*, 120 *N.J.* at 296-299, *State v. Moore*, 113 *N.J.* 239, 295-97 (1988), *State v. Rose*, 112 *N.J.* 454, 533-36 (1988), and *Bey II, supra*, 112 *N.J.* at 181-83.

- F -

Peggy Stevens testified that someone had stolen perfume and a camera from her house about a week before the murder of Schnaps. Several months later she had reported that a hatchet had been stolen. Because her family had used the hatchet only during the fall and winter, she did not know how long it had been missing. When the police searched defendant's car, they founds the camera and undeveloped photographs of Stevens' family.

At a *Rule* 8 hearing the State argued that Stevens' testimony established defendant's identity, showed his intent, and corroborated his confession, in which he had admitted having stolen a "hammer-like" instrument from someone's garage a week before the murder. Defendant countered that Stevens' testimony was inadmissible "other crimes" evidence because she could not state when she had last seen the hatchet and because her testimony did not prove that defendant had stolen it.

Evidence of "other crimes" is not admissible to prove a person's disposition to commit crime but is admissible "to prove some other fact in issue including motive, intent, plan, knowledge, identity, or absence of mistake or accident." *Evid. R.* 55. The State bears the burden of proving other crimes by clear and convincing evidence. *State v. Stevens*, 222 *N.J. Super.* 602, 614 (App.Div. 1988), *aff'd*, 115 *N.J.* 289 (1989).

Although the trial court admitted the evidence at first for "the issues of identification, state of mind, purposefully or knowingly, type of instrument used, presence of the defendant at the scene, [and] corroboration of [defendant's] confession," its jury instructions limited consideration of the evidence to the issue of identification.

Defendant argues that the testimony was inadmissible at the guilt phase because the State did not prove by clear and convincing evidence that defendant had stolen the items. The State, however, did provide substantial evidence of that allegation. The Stevens family had reported their camera as stolen about a week before the murder. The police had found the camera and film in the trunk of defendant's car. Defendant had confessed to having stolen a "hammer-like" object from a garage shortly before Schnaps' death. The trial court did not abuse its discretion in allowing Stevens' testimony. However, because we have determined that defendant's confession must be suppressed, the trial court should reconsider the issue in light of the remaining evidence.

The State contends that the trial court should have allowed the jury to consider Stevens' testimony not only for identification but also as evidence of defendant's purposeful intent. We see no basis for finding that the trial court abused its discretion in limiting admissibility to the issue of identification.

Defendant also argues that even if Stevens' testimony is admissible at the guilt phase, it should not be admitted

at the penalty phase. In the penalty phase the State "is restricted to proving the statutory aggravating factors and rebutting proof of mitigating factors." *State v. Rose*, *supra*, 112 *N.J.* at 503. The State asserts that Stevens' testimony is relevant to aggravating factor c(4)(c) as showing that "defendant armed himself with a weapon capable of inflicting pain and suffering in addition to death." The testimony is not admissible at the penalty phase for that purpose. The fact that defendant may have stolen a hatchet from the Stevenses is not relevant to c(4)(c). What matters is whether he used that weapon to inflict pain and suffering on the victim. Stevens' testimony is not relevant to that question. However, her testimony might be relevant to the issue of intent under c(4)(c). If the State proposes to show that defendant stole the hatchet for the purpose of inflicting pain and suffering on a future murder victim, Stevens' testimony might be admissible. Otherwise, if defendant is convicted of capital murder on remand, the trial court should not admit her testimony at the penalty phase.

- G -

Defendant alleges a number of penalty-phase errors involving jury instructions that did not conform to our holdings in subsequent capital cases. We need not consider those claims now. If there is a new penalty phase on remand, the trial court should heed those opinions in formulating its instructions.

Defendant also contends that the evidence does not support a finding of aggravating circumstance c(4)(c), that the murder was wantonly vile, horrible, or inhumane. The State argues that the murder of Schnaps falls into the category of c(4)(c) murders in which the perpetrator "intended to cause, and did in fact cause, severe physical or psychological pain or suffering to the victim prior to the victim's death." *State v. Ramseur*, 106 *N.J.* 123, 211 (1987). The State claims that defendant initially struck Schnaps in the

head with the hatchet to cause her severe physical pain and suffering prior to her death. Only later did he strike the fatal blows. The State further argues that there was evidence of post-death mutilation of the body that indicates depravity of mind.

Because the trial occurred before our opinion in *Ramseur*, the trial court did not analyze the evidence under our narrowed construction of c(4)(c). Given the factual nature of that issue, we will not pass on it without the trial court's having had the opportunity to evaluate the evidence. *See State v. Hightower supra*, 120 *N.J.* at 420.

- IV -

Defendant's capital-murder conviction is reversed. The cause is remanded for a new trial.

O'HERN, Justice, concurring and dissenting in part.

I concur in the opinion and judgment of the majority, expect to the extent that it invalidates defendant's confession.

This case is far removed from our recent confession case of *State v.* [*Walter*] *Johnson*, 120 *N.J.* 263 (1990). In that case the Court found the defendant's privilege against self-incrimination had been violated, but under circumstances in which "defendant repeatedly responded to questions by saying, 'I can't talk about it.' " *Id.* at 284. Such repeated refusals had to create an ambiguity about whether he had thereby expressed a "desire to cut off questioning." *Ibid.* We noted that "[d]efendant's reluctance to answer questions was not confined to an isolated ambiguous remark. He persisted, for well over an hour, in a pattern of prolonged silences and unresponsiveness, refusing to answer any and all questions about the * * * murders." *Id.* at 284. In the face of that kind of record we could conclude only that defendant's right to remain silent had been violated by the persistent renewal of questioning.

Nonetheless, in this case there is no ambiguity about what defendant said. He quite simply said, "I'll tell you about the murder, but first I want to see my father." Defendant's brief recites that "they stopped talking to him" and arranged for Harvey's father to be brought to the jail. Although defendant claims that he told his father that he did not commit the murder in question and that he had been struck by the police, there is no evidence that Harvey's father, much less Harvey, asked that the questioning cease after the father and son had met. It took some time for the police to arrange for defendant's father to be brought to the station house, but that ought not make the interruption qualitatively different from an interruption for food, rest, or other requests.

Here, as in the fourth-amendment context, there is no "litmus-paper test" of constitutionality. *See Florida v. Royer*, 460 *U.S.* 491, 506, (1983). After all, the warnings in *State v. Hartley*, 103 *N.J.* 252 (1986), do not necessarily guarantee that a constitutional violation will not occur. Were the *Hartley* admonition all that there were to the constitutional obligation, interrogators might continue to question suspects indefinitely by repeated recitations of the *Miranda* warnings. Rather, the question is whether the suspect has at least ambiguously invoked his right to remain silent or to request that questioning cease. In that regard, the confession obtained in *State v. Bey II*, 112 *N.J.* 123 (1988), provides guideance. There, the defendant claimed that his request to lie down and "think about what happened" was an invocation of his right to cut off questioning, and that the police failed to "scrupulously honor" his right by resuming interrogation without reissuing a *Miranda* warning after his one hour or rest. In rejecting defendant's argument, the Court observed that any reasonable police officer could not have construed the statement as an assertion of his right to remain silent:

> Defendant merely communicated his desire to spend some time thinking about the events that

> were the subject of the interrogation. He did not ask for an attorney or refuse to sign a waiver of his rights. Similarly, he did not refuse to continue the questioning, and did not indicate in any manner that he wanted to end the interrogation. Not every break in questioning compels renewed administration of the *Miranda* warnings. Otherwise, police would be obliged to administer these warnings each time a defendant requested or was offered something to eat or drink, the use of toilet facilities, the opportunity to stand and stretch, or, as here, time to lie down. [*Id.* at 138-39.]

Harvey did not ask that questioning should end. A contrasting case is *State v. Bey I*, 112 *N.J.* 45, 64 (1988), in which the defendant told the police that "he did not want to talk to [them] about [the victim]." As noted, in this case Harvey specifically told the police that he would tell them about the murder, but first he wanted to see his father. How could the police have concluded in the face of defendant's willingness to continue testifying after he had seen his father that his request was anything other than what it appeared to be on its face? After all, this was not a case of a single set of warnings and desultory questioning. Recall that this was an evolving investigation into a series of burglaries that occurred in the vicinity of West Windsor; therefore, it was not surprising that the questioning had to continue over an extended period of time.

In short, the defendant never invoked his right to silence in the first place, wherefore *Hartley* is not triggered. Were I to conclude, as does the majority, that the defendant had requested that questioning cease, I would agree that we would then have to consider the retroactive application of *Hartley* in lieu of the totality of circumstances test suggested by Justice Stein in his separate opinion.

STEIN, J., concurring in part and dissenting in part.

Except for its conclusion that our decision in *State v. Hartley*, 103 *N.J.* 252 (1986), must be applied retroactively to police interrogations that occurred before the *Hartley* opinion had been published, I join in the opinion of the majority. I write separately to emphasize and explain my disagreement with the Court's holding concerning *Hartley*'s retroactive application. I find that *Hartley*'s purpose to "avoid * * * confusion and conflict in future cases, * * * on the question of the *minimum* requirement for 'scrupulously honoring' [the right to silence]," *id.* at 268, and its recognition of "[t]he necessity for our giving guidance to our own law-enforcement officials * * *," *id.* at 285, are irreconcilable with today's holding that *Hartley* must be applied to invalidate confessions elicited by interrogations conducted *before* law-enforcement officials learned of *Hartley*'s bright-line rule requiring mandatory rewarning whenever a suspect asserts a right to silence. The result of applying *Hartley* to the interrogation in this case, in the course of which police officers administered *Miranda* warnings to defendant on *seven* separate occasions between his arrest and confession, highlights the anomaly of the Court's determination to accord *Hartley* full retroactivity.

I.

> In *State v. Hartley*, this Court held that before an accused's previously-asserted right to remain silent may be deemed to have been "scrupulously honored," law-enforcement authorities must, at a minimum, readminister the *Miranda* warnings. In the absence of those renewed warnings any inculpatory statement given in response to police-initiated custodial interrogation after the right to silence has been invoked is inadmissible. [Id. at 256.]

The Court based its decision "not only on our understanding of federal constitutional law, but on our state

common-law privilege against self-incrimination as well." *Id.* at 284. It acknowledged, however, that the United States Supreme Court had not yet ruled on the issue, and that its prediction concerning how that Court would rule, if confronted with the *Hartley* question, might by incorrect:

> In respect of federal constitutional law, therefore, ours is a predictive exercise, one conducted on the basis of our best understanding of the authorities, but nonetheless predictive. We think our reading of the federal law is right. We acknowledge that it may be wrong. Given the importance of the question involved, we see our duty to settle it as a matter of state law. [*Id.* at 284-85.]

Whether *Hartley* is based primarily on federal constitutional law or state law is critical to the question of its retroactive application. As we acknowledged in *State v. Lark*, 117 *N.J.* 331 (1989),

> [t]o the extent that retroactivity issues arise in the context of criminal-procedure decisions implicating rights guaranteed under the federal constitution, United States Supreme Court precedents control the scope of retroactivity. [*Id.* at 335 (citation omitted).]

In *Griffith v. Kentucky*, 479 *U.S.* 317, (1987), the Supreme Court held that new constitutional rules of criminal procedure apply retroactively to cases pending on direct review, whether or not the rule constitutes a "clean break" with the past. *Id.* at 328. Thus, if our holding in *Hartley* is rooted primarily in federal constitutional law, its rertroactive application to cases on direct appeal is mandated by *Griffith*.

Particularly because our holding in *Hartley* purports merely to predict federal constitutional law, it would be

realistic to consider *Hartley* as based primarily on state law. Although decided in 1986, *Hartley*'s holding has yet to be adopted by the Supreme Court, and several federal courts had previously decided confession cases in a manner inconsistent with Hartley's bright-line rule. See *Stumes v. Solem*, 752 *F.*2d 317, 321 (8th Cir. 1985) ("[W]e believe that Stumes was aware of his *Miranda* rights and voluntarily chose not to exercise them. To require the police to reissue *Miranda* rights under these circumstances would serve no real purpose."), *cert. denied*, 471 *U.S.* 1067 (1985); *Jarrell v. Balkcom*, 735 *F.*2d 1242, 1254 ("We conclude that no violation of petitioner's rights occurred by the failure to reissue the *Miranda* warnings * * * ."), *reh'g denied*, 740 *F.*2d 979 (11th Cir. 1984), and *cert. denied*, 471 *U.S.* 1103, (1985); *United States v. Hackley*, 636 *F.*2d 493, 500, 504-05 (D.C. Cir. 1980) (third set of *Miranda* warnings not required and statement made two hours after last warnings held admissible; dissenting opinion views colloquy with accused as reinterrogation); *Brown v. Tard*, 552 *F.Supp.* 1341, 1349 (D.N.J. 1982) ("*Miranda* does not require that a fresh set of warnings be repeated each time the police resume interrogation after an interruption."); *see also Miller v. United States*, 396 *F.*2d 492, 496 (8th Cir. 1968) (rewarning not required each time interrogation process renewed), *cert. denied*, 393 *U.S.* 1031, (1969); *United State v. Kinsey*, 352 *F.Supp.* 1176, 1178 (E.D.Pa. 1972) (*Miranda* warnings do not become stale).

Because *Hartley*'s federal constitutional underpinning is questionable, and because there is no doubt about the availability of state common law as a source of Hartley's bright-line rule, it is appropriate that the issue of *Hartley*'s retroactivity be determined by state standards. *Cf. State v. Lark, supra*, 117 *N.J.* 331, 335 (retroactivity of *State v. Howard*, 110 *N.J.* 113 (1988), determined by state law, although *Howard* collaterally implicates federal constitutional rights).

In *State v. Burstein*, 85 *N.J.* 394 (1981), we summarized the options available in determining the retroactive application of our decisions:

> [W]e note that this Court has four options open to it in any decision involving retroactivity: (1) make the new rule of law purely prospective, applying it only to cases whose operative facts arise after the new rule is announced; (2) apply the new rule to future cases and to the parties in the case announcing the new rule, while applying the old rule to all other pending and past litigation; (3) grant the new rule limited retroactivity, applying it to cases in (1) and (2) as well as to pending cases whee the parties have not yet exhausted all avenues of direct review; and, finally, (4) give the new rule complete retroactive effect, applying it to all cases, even those where final judgments have been entered and all avenues of direct review exhausted. [*Id.* at 402-03 (citation omitted).]

Our choice among those four options has been informed generally by weighing

> (1) the purpose of the rule and whether it would be furthered by a retroactive application, (2) the degree of reliance placed on the old rule by those who administered it, and (3) the effect a retroactive application would have on the administration of justice. [*State v. Nash*, 64 *N.J.* 464, 471 (1974).]

All three of the *Nash* factors counsel against retroactive application of *Hartley*. To the extent that the purpose of *Hartley* is to give "guidance to our own law-enforcement officials," 103 *N.J.* at 285, and "avoid * * * confusion and conflict in future cases," *id.* at 268, retroactive application is a *non sequitur*. Applying the second *Nash* factor, the degree of reliance placed on the pre-*Hartley* law requiring

Miranda warnings before custodial interrogation, and mandating that law-enforcement officials "scrupulously honor" a suspect's assertion of the right of silence, *Michigan v. Mosley*, 423 *U.S.* 96, 105, (1975), is amply illustrated by the interrogation in this case. Police officers administered *Miranda* warnings to defendant on seven separate occasions between his arrest and his confession. As the majority opinion acknowledges, "[t]here is no evidence of police coercion or misconduct. There were no extended interrogations designed to wear down defendant's will." *Ante* at 418. It is entirely reasonable to assume that if *Hartley* had been decided before defendant's interrogation, the police officers who had so diligently attempted to comply with the dictates of the *Miranda* rule might well have rewarned defendant after his meeting with his father and prior to resuming interrogation. To invalidate defendant's confession because the police did not observe *Hartley*'s bright-line rule—a rule that did not then exist—is manifestly inappropriate and inconsistent with our retroactivity jurisprudence.

Finally, retroactive application of *Hartley* may very well generate a multitude of post-conviction relief applications from defendants whose confessions were elicited by pre-*Hartley* interrogations. Those confessions may have passed muster under *Michigan v. Mosley, supra*, 423 *U.S.* 96, which required that a suspect's assertion of the right to silence be scrupulously honored, but may not satisfy *Hartley*'s bright-line rule mandating readministration of *Miranda* warnings before resumption of questioning. Thus, it is likely that retroactive application of *Hartley* would adversely affect the administration of justice.

The majority correctly observes that prior decisions of this Court, although not deciding the issue, assumed that *Hartley* applied retroactively, citing *State v. Bey*, 112 *N.J.* 45, 67 n.11 (1988) (*Bey I*), and *State v. Bey*, 112 *N.J.* 123, 134-43 (1988) (*Bey II*), *anta* at 419. In my view, our as-

sumptions in *Bey I* and *Bey II* were unfounded, and should not impel us to decide the issue incorrectly.

The majority compares retroactive application of *Hartley* to the treatment given by the Supreme Court to *Miranda v. Arizona*, 384 *U.S.* 436, (1966), observing that "*Miranda* applies to intrrogations that took place before that rule was announced if the trial did not commence until after the *Miranda* decision." *Ante* at 422 (citations omitted). The majority suggests that application of *Hartley* should be no less broad that that of *Miranda*, noting the "obvious similarity" between the "nature and effect" of the two decisions. However, the Supreme Court decision applying *Miranda* to cases tried after the date of decision in that case explicity *rejected* full retroactive application of the rule:

> In the light of * * * various considerations, we conclude that * * * *Miranda* * * * should not be applied retroactively.
>
> * * * * * * * * * * * *
>
> * * * Future defendants will benefit fully from our new standards governing in-custody interrogation * * * . Law enforcement officers and trial courts will have fair notice that statements taken in violation of these standards may not be used against an accused. Prospective application only to trials begun after the standards were announced is particularly appropriate here. Authorities attempting to protect the privilege have not been apprised heretofore of the specific safeguards which are now obligatory. Consequently they have adopted devices which, although below the constitutional minimum, were not intentional evasions of the requirements of the privilege. In these circumstances, to upset all of the convictions still pending on direct appeal which were obtained in trials preceding * * * *Mi-*

> *randa* would impose an unjustifiable burden on the administration of justice.
>
> At the same time, we do not find any persuasive reason to extend * * * *Miranda* to cases tried before those decision were announced, even though the cases may still be on direct appeal. [*Johnson v. New Jersey*, 384 *U.S.* 719,732-33, (1966).]

Thus, the Court rejected both full retroactivity and retroactive application to cases pending on appeal but tried prior to *Miranda*. The limited form of retroactive application employed by the Court in *Johnson* need not guide our determination of retroactivity under State law.

Relying on the *Nash* factors, this Court has in the past rejected retroactive application of new rules of law that would have invalidated "law enforcement actions undertaken in good-faith reliance upon then long-standing legal authority." *State v. Carpentieri*, 82 *N.J.* 546, 549 (1980); *cf. State v. Lark, supra*, 117 *N.J.* 331 (limiting retroactive application of *State v. Howard, supra*, 110 *N.J.* 113, to pipeline cases); *State v. Catania*, 85 *N.J.* 418, 446 (1981) (minimization standards adopted by court to be applied only prospectively); *State v. Burstein, supra*, 85 *N.J.* 394, 411 (holding in *State v. Cerbo*, 78 *N.J.* 595 (1979) that delay in presenting wiretap tapes for sealing required suppression absent explanation for delay, would be applied only prospectively); *State v. Carpentieri, supra*, 82 *N.J.* 546 (holding that *Delaware v. Prowse*, 440 *U.S.* 648, (1979), applies only to random traffic stops occurring after date of decision); *State v. Howery*, 80 *N.J.* 563 (1979) (holding that *Franks v. Delaware*, 438 *U.S.* 154, (1978), applies only to search warrants issued after date of decision).

Prospective application of our decision in *Hartley* is fully consistent with these decision. It avoids the invalidation of confessions admissible in evidence but for the non-observance of *Hartley*'s bright-line rule, which was not only

unknown but unanticipated before this Court's decision in *Hartley* was published.

II.

As I view this record, defendant asserted his right to cut off questioning when he told the police officers that "he would tell [them] about the murder but he first wanted to speak to his father." The resumption of interrogation after defendant spoke to his father, even without fresh *Miranda* warnings, did not constitute a failure by the police to "scrupulously honor" defendant's right to remain silent. In the context of the numerous administrations of *Miranda* warnings over the past several days, the officers could reasonably have assumed that defendant was aware of his right to cut off questioning at any time. The trial court determined that the police officer "fully * * * complied with all of the defendant's constitutional rights," and that defendant knowingly and voluntarily waived his right to remain silent. I would hold that defendant's confession was properly admitted in evidence.

Garibaldi, J., joins in this opinion.

HANDLER, Justice., concurring and dissenting in part.

In November 1985, the State indicted defendant, Nathan Harvey for capital murder, robbery in the second degree, and burglary in the second degree. Following a jury trial, in October 1986, defendant was convicted on all counts.

The Court now reverses defendant's capital murder conviction and death penalty. I concur in its judgment. I am in accord with the Court's determinations that reversible error occurred in the admission into evidence of defendant's confession and in the failure to provide defendant with a charge that clearly distinguished between intentional murder and murder based only on intent to cause serious bodily injury resulting in death. I write separately to stress what I believe to be additional reasons for the reversals

of the conviction and sentence. These relate to the admission and use of expert testimony and of evidence of other crimes. I also reiterate my view that the State's capital murder statute is unconstitutional as enacted, construed and applied, also warranting the reversals in this case. See *State v. DiFrisco*, 118 *N.J.* 253, 284 (1990) (Handler, J., dissenting and concurring).

I.

The Court recognizes, and the State concedes, that defendant's confession is the most significant evidence of guilt in this case. The Court now rules that the confession was unconstitutionally obtained because the police failed to scrupulously honor his request to remain silent. *Ante* at 421. I agree with that ruling.

The Court emphasizes that the murder charge in this case clearly failed to comply with the standards of *State v. Gerald*, 113 *N.J.* 40, 69 (1988). I concur in the Court's determination that defendant is entitled to a murder charge that distinguishes intentional murder from serious-bodily-injury murder. *Ante* at 412-414. It is also clear that the failure to give a *Gerald* charge resulted in a determination that cannot be the basis of a capital murder conviction. The jury verdict sheet stated that a finding of intent to cause either death or serious bodily injury resulting in death constituted capital murder. Moreover, as the Court points out, there was adequate evidential support for a *Gerald* charge. *Ante* at 413-414; see *State v. Coyle*, 119 *N.J.* 194, 209 (1990). Because the jury was charged on felony-murder, aggravated manslaughter, and manslaughter, there was sufficient evidence to support murder verdicts that were neither knowing nor purposeful. *See State v. Pennington*, 119 *N.J.* 547, 562 (1990).

II.

The Court recognizes the problematic quality of much of the expert testimony in this case. *Ante* at 425-431. I

have the same misgivings as does the Court with respect to much of this evidence. In my view, however, portions of it were unquestionably incompetent and inadmissible, and the resultant prejudice constitutes added grounds for reversal of the conviction.

I concur in the Court's determination that the trial court abused its discretion in admitting the purportedly expert testimony of Dr. Lovejoy. *Ante* at 425-429. Dr. Lovejoy's analysis of the blood-stained pillowcase, and conclusion that a "small man" or an "average-size woman" with a show size of $6^1/_2$ plus or minus one-half size left the print on the pillowcase, were based on an unproven and unreliable methodology. See *State v. Zola*, 112 *N.J.* 384, 447-48 (1988). Moreover, because this opinion testimony was central identification evidence linking Harvey to the crime, as stressed by the prosecutor in his guilt-phase summation, the error in admitting Dr. Lovejoy's opinion is reversible in my view.

Another serious error involves the expert opinion of Dr. Marvin Shuster. Dr. Shuster performed the autopsy on the victim and testified as a State witness to his opinions and conclusions regarding the cause of death. Defendant claims that the trial court erroneously allowed critical aspects of this opinion testimony which were not based on a reasonable degree of medical certainty or probability. The Court acknowledges the validity of that standard, noting that "opinions as to possibility are inadmissible," but rules only that it must be satisfied on a retrial. *Ante* at 431. This opinion testimony was important, the error in its admission serious, and the prejudice caused thereby substantial. I believe it constitutes an independent ground for reversal and the Court, rather than content itself with a precatory admonition, should so state.

On direct examination, Dr. Shuster testified about the length and location of a major head wound. He then indicated the "particular wound . . . looked like it was a confluence or [*sic*: of?] at least two." He also stated that

"there were pressure marks on the neck" and that "[i]t usually takes quite a number of minutes, probably more in the realm of an hour," to apply that pressure.

That testimony had the potential of being highly significant evidence of the manner in which the killing occurred. Nevertheless, the witness' conclusions were based on no more than "possibilities." He testified as follows:

> Q. And [the autopsy report] talks about that six inch opening?
>
> A. That's right.
>
> Q. And is says, does it not, obvious fracturing of the skull is present in the depths of this wound which *may* represent the confluence of several wounds, is that correct?
>
> A. That's correct.
>
> Q. In other words you say that its *possibly* two wounds?
>
> A. Yes.
>
> Q. And it's *possibly not*?
>
> A. That s correct.
>
> Q. This marking on the neck you said *could have been* the result of pressure for approximately an hour, is that correct?
>
> A. That's what I said, yes, sir.
>
> Q. And again this is in the area of *possibility*, is that correct, *it could be possibly less, possibly more*?
>
> A. That's correct, yes.
>
> * * * * * * * * * * * * * *
>
> Q. And you said that it was a blunt object that causes these injuries, is that correct?

A. I said *object or objects.*

Q. You said object or objects?

A. Yes.

Q. Outside the presence of this jury you had voiced an opinion that there was *possibly two objects*?

A. Either two objects or one object with several either sides or characteristics capable of giving different patterns to the injuries, yes.

Q. And this in the range, again, of *possibility*?

A. That's correct.

* * * * * * * * * * * * * * * * *

Q. And the number of blows as you said, *this is the range of possibilities, too, you can't say that definitely or probably that it was fifteen, as far as you know it's possibly fifteen or more*?

A. Fifteen or more, yes.

Critical portions of Dr. Shuster's testimony were not couched in terms of sifficient medical certainty. I believe the failure to explicity categorize *all* significant portions of Dr. Shuster's testimony in terms of reasonable medical certainty resulted in the disclosure of speculative and inadmissible evidence.

Dr. Shuster's testimony cannot be minimized with respect to its force and influence in this case. His opinions about the number of blows and the type of instrument causing the victim's injuries were crucial to the prosecution's theory that this was not a reflexive or impulsive homicide justifying a manslaughter verdict. The opinion evidence escalated the case into an intentional homicide coupled with a purpose to inflict gratuitous pain and suffering, clearly prejudicing defendant's ability to have a fair

determination under *Gerald* as well as to avoid the death penalty under aggravating factor c(4)(c). Yet that opinion evidence was so patently inadequate in terms of the standards that govern medical testimony that its admission must be deemed reversible error.

III.

The Court finds no major difficulty with respect to a prior conviction admitted for inpeachment purposes, nor is particularly troubled by the admission of other-crimes evidence. *Ante* at 431-432. I believe the conventional standards under which these evidentiary rulings were made are inadequate in the capital-murder context and that, in both instances, reversible error occurred. See *State v. Long*, 119 *N.J.* 439, 513-18 (1990) (Handler, J., concurring and dissenting).

The Court finds unexceptional the admission of a prior rape conviction to impeach defendant's credibility under *State v. Sands*, 76 *N.J.* 127 (1978). "Given the seriousness of his prior offenses, we see no reason to second-guess the trial court." *Ante* at 432. It is extraordinary that such evidence could be received in light of other evidence relating to a single pubic hair attributable to a black person found on the victim, which disclosure had the unmistakable potential to inject sexual assault into the case. *Ante* at 429.

The Court rules that, "[o]n retrial the prosecution should refrain from referring to the hair as a 'pubic hair.' " *Ibid.* That does not eliminate the grave potential for prejudice inherent in the prior rape conviction, however. Informing the jury that defendant had committed another serious, violent crime in the past has the clear capacity to influence its determination of *substantive* guilt on the capital-murder count. In a capital case, the slight bearing on credibility that such a prior conviction may have can never outweigh such profound prejudice in my estimation. *See State v.*

Pennington, supra, *N.J.* at 561-63 (Handler, J., concurring and dissenting).

The Court recognizes that the other-crimes evidence pertaining to defendant's theft of a hatchet could have a prejudicial impact with respect to the penalty phase of the trial. *Ante* at 434-435. In my view, it is imperative that the potential for prejudice of such evidence in the *penalty*-phase trial be considered by the trial court in determining it s admissibility in the *guilt*-phase trial. I stressed in *State v. Long, supra*, that

> under *Evidence Rule* 55 and *Evidence Rule* 4, the court must go further and determine the existence of potential prejudice, and weigh the prejudice against the probative worth of the evidence. Because "other-crime evidence has a unique tendency to turn a jury against the defendant," *State v. Stevens*, 115 *N.J.* 289, 302-03 (1989), that weighing process is particularly critical in a capital-murder prosecution. Such proof offered in the guilt phase of a capital-murder trial has an "evidentiary fallout" that can taint not only the jury's determination of guilt but also its determination of life or death. [119 *N.J.* at 515 (Handler, J., concurring and dissenting).]

I repeat:

> Those several considerations under-score the need in a capital-murder prosecution to require that any *Evidence Rule* 4 hearing to determine the admissibility of other-crimes evidence—other uncharged crimes, other charged crimes, and other prior convictions—must take into account not only the prejudicial effect on the determination of guilt but also the prejudicial effect on the determination of sentence. *See State v. Pennington, supra*, 119 *N.J.* at 586-87. The court must, in the guilt-phase of a capital-murder pros-

> ecution, I submit, bring into the equation a consideration of the prejudice such evidence can have in terms of arousing, inflaming, or confusing a jury in its critical assessment of aggravating and mitigating factors, and in terms of the capacity of such evidence to mark defendant as an evil, violent and dangerous person. [*Id.* at 516 (slip op. at 16-17) (Handler, J., concurring and dissenting).]

Those considerations apply here. As I view the record they justify reversal.

IV.

I concur and dissent in part from the judgment of the Court.

Concurring in part, dissenting in part - Justice HANDLER, O'HERN, GARIBALDI and STEIN - 4.

For reversal and remandment - Chief Justice WILENTZ, and Justice CLIFFORD and POLLOCK - 3.

APPENDIX B

ORAL OPINION OF THE SUPERIOR COURT, LAW DIVISION

[T9/17/86 at 113]

As earlier indicated this motion not only seeks an order to suppress evidence seized pursuant to a warrantless and warrant searches but also seeks an order suppressing all statements and confessions made by this defendant to all police authorities.

In other words, I'm dealing now, counsellors, with the Miranda aspect of your motion.

Defense substantially asserts that the statements made by the defendant were the result of unlawful physical and mental coercion, a failure to honor his Miranda rights, late arraignments, beating and badgering of the defendant and the denial of his Sixth Amendment rights.

The evidence shows that all the statements and confessions made by this defendant were pursuant to a custodial interrogation. I have no problem finding that the setting under which he was interrogated by both the Mercer County and the Middlesex County police [114] authorities was a custodial interrogation within the meaning and definition in the Miranda case.

Having so determined that it was, statements procured pursuant to a custodial interrogation, the Miranda warnings or as we say the Miranda mandate is now applicable, and the State is required to prove beyond a reasonable doubt that the Miranda warnings were given to this defendant before the interrogation commenced and before any statements were taken from him.

They also have the burden of proving beyond a reasonable doubt that he knowingly and intelligently waived his constitutional right prior to the making of any statements or confessions.

The State, additionally, whether Miranda is applicable or not must prove beyond a reasonable doubt that any statement, any confession this defendant made passes the test of voluntariness. They must prove also beyond a reasonable doubt that it was voluntarily given, and the issue of voluntariness is only made after this Court makes a complete and thorough review of the totality of all of the circumstances, relevant circumstances immediately surrounding the making of the statements challenged and the confessions, all of the circumstances and factors prior to, during and even [115] after.

I must weigh all of the factors that favor voluntariness against all of the factors in the case that weigh against it. That's what is meant when we say the totality of all the circumstances determines whether a statement or a confession is voluntary or not.

That includes, obviously, the characteristics of the defendant. His age, the level of his intelligence, his education, as well as his mental and physical condition at the time of the interrogations and when he made the challenged statements and confessions.

The Court must also review and examine the number, the number and the durations of the interrogations and determine whether any of the methods used by the officers included any physical or mental coercion, any threats or promises or inducements to persuade him to confess. Whether any deceptive techniques were used, whether there was any direct or implied promises made to the defendant or rewards of benefit. Did the police utilize any psychologically oriented techniques to procure statements and confessions from the defendant? If a person is suffering from a mental disability which renders him incapable of understanding his constitutional rights, [116] obviously any waiver would be void.

With respect to the intelligence factor, subnormal mentality does not ipso facto render a statement or a confes-

sion involuntary. It's a factor to be considered, and if it doesn't deprive the person of his capacity to understand the meaning and the affect [*sic*] of a confession it does not weigh against the voluntariness of the same. Mental subnormality is just another factor to be considered together with the others.

Any statement which is the product of physical violence or the threat of it, or a threat some harm may befall the defendant and his family is involuntary. Any statement which is influenced or is the result of any promise which holds out a hope or benefit of reward is involuntary. Any promise, even if indefinite in nature that his punishment maybe [*sic*] reduced if he confesses is involuntary. Any misrepresentation by the police as to the quantity or the availability of evidence against him is another factor to be considered and weighed together with all of the other relevant surrounding factors.

The use of psychologically oriented techniques in questioning a person is not inherently coercive but is, again, another factor to be considered by this [117] Court with the other factors. To indicate to a defendant that he would or might receive help for a problem if diagnosed to exist, and if he requires help, doesn't render a confession involuntary.

As indicated earlier under New Jersey law a confession obtained during a period of delayed arraignment is not, per se, inadmissible, however, is another factor to be weighed together with all the other factors.

The credible evidence presented at this hearing establishes beyond a reasonable doubt that the defendant received his Miranda warnings on several occasions in writing and verbally before he was interrogated by and made statements and confessions to both police authorities, Mercer and Middlesex. It also establishes beyond a reasonable doubt that he knowingly and intelligently waived his constitutional rights. The evidence presented at this hearing

establishes beyond a reasonable doubt that the statements and confessions made by the defendant to the Mercer County and Middlesex County police authorities were voluntarily made.

As I indicated earlier, if you listen to the tapes of the recorded conversations, during one of the interrogations with the West Windsor Police Department [118] and the taped conversation during the tour of West Windsor with the defendant, you quickly conclude that this is not a defendant that's laboring under any form of violence, coercion, physical or mental disability. His awareness, his comprehension of what he was doing is clearly demonstrated by the taped conversations which revealed completely direct, responsive and coherent responses to questions addressed to him by the police authorities. Certainly no offensive police action indicated or demonstrated, in fact, the evidence, credible evidence clearly establishes, as I stated before, and I'll state it again because I was talking about consent before, I'm on confession now, shows that the police officers fully recognized, complied with all of the defendant's constitutional rights in this matter, and the police authorities recognized and respected, and they are to be complimented for it not criticized, his human needs and complied with all of his requests with reasonable dispatch.

The State correctly asserts that the law enforcement officials gave this defendant more than what the law requires. I agree. The credible evidence presented pertaining to the number and duration of all interrogations of the defendant as well as the method [119] of interrogation clearly negates in my mind any contention that there was any form of offensive police action by either the Mercer County and Middlesex County law enforcement authorities, prior to, during and subsequent to any of the interrogations of the defendant.

The police did not use deception. They made no promises or inducements to persuade this defendant to confess nor did they make any promise of reward or benefit. They did indicate, and as I recall Sergeant Hibbs' testimony and listening, I believe, to the tape, they did indicate to the defendant that if he had a problem he would probably get some treatment if deemed necessary,and as I indicated earlier this does not render this statement, per se, coercive or involuntary.

With respect to the defendant's assertion that his Sixth Amendment rights were violated as it pertains to statements and confessions made to the West Windsor police, the evidence, the credible evidence clearly establishes that except for the consent to search all statements and confessions made by this defendant to the West Windsor Police Department were given prior to the municipal court arraignment, the first adversarial judicial proceeding.

With respect to the statements and confessions [120] made to the West Windsor police authorities the defendant's Sixth Amendment rights were not violated. Interrogations do not constitute an adversary judicial proceeding under Rule 3:4-1.

With respect to the interrogation of the defendant by the Middlesex County police authorities, the credible evidence establishes beyond a reasonable doubt that the police authorities gave the defendant his Miranda warnings more than once in writing and verbally before the interrogations and that the defendant intelligently and knowingly waived his constitutional right. The defendant made statements to the Middlesex County law enforcement authorities after the Superior Court arraignment and certainly after the municipal court arraignment.

The State cites State versus Porter which allows them to question this defendant about the Middlesex County murder notwithstanding the fact that he had two prior arraignments, because the investigation pertaining to the

interrogation by the Middlesex County law enforcement officers did not pertain to the subject matter of those two arraignments, and they contend, and they are right, Porter allows it.

The defendant was arraigned on the Mercer County charges, questioned by the Middlesex County law [121] enforcement officials on matters pertaining to the Middlesex County murder, as I indicated, which is lawful and permissible.

In addition to giving the defendant his Miranda warnings several times which included his right to counsel, the municipal court judge who conducted the arraignment to the defendant on the municipal level, on the Mercer County charges, fully advised him of his right to counsel. This defendant, after being told by two judges, several police officers on numerous occasions of his right to counsel never exercised that right. He requested an attorney for the first time after he had confessed to the Middlesex County law enforcement officials and when an effort was made by the police authorities, I believe, to transcribe it through the word processor, and I might say the evidence established testimonially was that as soon as he made that request all interrogation ceased immediately.

There was some reference, and I want to acknowledge this, Mr. Justin, Mr. Justin also gave the Court, and I believe a copy to the Prosecutor, of the decisions rendered in State versus Parson, 83 New Jersey Superior 430 and State versus Vayder, 114 New Jersey Superior 260, I'm not sure, I think they may [122] have been two Middlesex County cases, I know at least one was.

MR. JUSTIN: That's correct.

THE COURT: In these two cases that was furnished to the Court, it's not mentioned in the brief but I want the record to show we did get these decisions that you did make reference to in your presentation, Mr. Justin,

that both cases dealt basically with the execution of search warrants.

The Court in both of these cited cases was dealing factually with a situation wherein it was alleged two searches were conducted under one search warrant, and in the Parson case, as I recall, there were two separate searches about four or five days apart but one search warrant and that court said, no, you can't do that, only one search for one search warrant.

However, Vayder, the second cited case, dealt with a different fact pattern. In that case they cited and recognized the Parson ruling of only one search under one search warrant but said that in the Vayder case that they didn't have two searches under one search warrant, that when they went out to the Highland Park fire initially that was investigation that was not a search but when they went the second time it was a [123] search, so in reality you only had one search under one search warrant, and I bring that out, and now with respect to the assertion that the trunk was opened twice, I think when you look at all the facts in this case, when you consider what happened when it was opened the first time, how it was left open and how much time transpired and what took place and why it was opened again, you are dealing basically here, I think, factually, with one, assuming for a moment I accept your analogy and that is when the law says one search under one search warrant that that also should mean or be extended to one search under one consent, assuming and conceding that just for a moment so I can make my point, you've had here basically one search under one valid consent.

I want to comment on that because you did bring it up, Mr. Justin.

MR. JUSTIN: Thank you, Judge.

THE COURT: Based on all the credible evidence presented as well as the applicable law this Court finds and

determines that the State proved beyond a reasonable doubt that the defendant was fully advised of his constitutional rights, knowingly and intelligently waived them and also the State's proved beyond a reasonable doubt that all of the defendant's [124] statements, confessions were voluntarily made. None of the defendant's constitutional rights were violated.

Accordingly, the motion to suppress the statements and confessions challenged by the defense made by the defendant to both the Middlesex and the Mercer County police law officials is denied, and also I deny the motion of the defense to suppress the physical evidence seized pursuant to the valid consent to search, the warrantless search and the searches pursuant to the search warrant.

Thank you gentlemen.

No. 90-1142

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

STATE OF NEW JERSEY, Petitioner,

v.

NATHANIEL HARVEY, Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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Supreme Court, U.S.
FILED
FEB 11 1991
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1990

NO. 90-1142

STATE OF NEW JERSEY, Petitioner,

v.

NATHANIEL HARVEY, Respondents.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

I, Nathaniel Harvey, being duly sworn according to law, depose and say that I am the respondent in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said case or to give security therefor.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost or proceeding in this Court are true.

1. Are you presently employed?

NO

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other sources?

NO

3. Do you own any cash or checking or savings account?

NO

4. Do you own any real estate, stock, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothings)?

NO

5. List the persons who are dependent upon you for support and state your relationship to those persons.

NO

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

NATHANIEL HARVEY

Subscribed and Sworn to before me
this day of , 1991.

QUESTION PRESENTED

Whether this Court has jurisdiction or should exercise jurisdiction to review a decision of the New Jersey Supreme Court which is alternatively and plainly based on an adequate and independent state ground?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1990

No. 90-1142

STATE OF NEW JERSEY, Petitioner,

v.

NATHANIEL HARVEY, Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE UNITED STATES

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

Respondent, Nathaniel Harvey, respectfully submits that a writ of certiorari to review the judgment and opinion of the New Jersey Supreme Court in State v. Harvey, 121 N.J. 407, 581 A.2d 483 (1990), is unnecessary and should not issue.

The New Jersey Supreme Court reversed the defendant's capital murder conviction and ruled that his confession could not be introduced at his retrial. The court relied on its previous decision in State v. Hartley, 103 N.J. 252, 511 A.2d 80 (1986), which established as a matter of state law a bright line rule that "failure to readminister Miranda warnings before interrogation an accused who has previously invoked the right to silence will invariably result in a finding that the right has not been scrupulously honored." 103 N.J. at 279, 511 A.2d at 94.

The New Jersey Supreme Court did not reach Mr. Harvey's contention that his confesson was involuntary. 121 N.J. at 425, 581 A.2d at 491 (App. A at 15)

OPINIONS BELOW

The opinion of the New Jersey Supreme Court is reported at 121 N.J. 407, 581 A.2d 483 (1990).

STATEMENT OF THE CASE

Nathaniel Harvey was charged by Middlesex County Indictment Number 568-11-85 with the June 1985 murder of Irene Schnapps in Plainsboro, New Jersey.

On October 28, 1985, Nathaniel Harvey was arrested in West Windsor Township on unrelated charges of kidnapping and burglary. He remained in police custody and was questioned about several crimes including the murder of Irene Schnapps.

On the morning of October 30, 1985, Harvey was arraigned in the Mercer County Court House before 10:00 a.m. At 10:15 a.m. Detectives Rizzo and Zimmerman of the Middlesex County Prosecutor's Office arrived at the Mercer County jail. They came to interrogate Harvey but whether he was advised of his Miranda rights during this session is unclear. Rizzo initially testified that Harvey was not advised of his rights, though he subsequently maintained that the Miranda card Harvey signed the previous evening was read to him. Rizzo's report does not mention that Harvey was advised at this morning session. (T 38-2 - Sept. 15); (T 46-5 - Sept. 15) Rizzo's testimony, and report, however were clear with respect to what Harvey told the detectives. Harvey said "I'll tell you about the murder but first I want to see my father." (T 14-1 to 15-20 - Sept. 15) They "stopped talking to him," (T 14-10 - Sept. 15), and arranged for Harvey's father to be brought to the jail. However, while waiting the two hours it took to bring defendant's father, the detectives sat with Harvey and "spoke about things in general." (T 14-15 - Sept. 15)

detectives sat with Harvey and "spoke about things in general." (T 14-15 - Sept. 15)

Investigator Baez of the Middlesex County Prosecutor's Office picked up Robert Harvey at his job, and brought him to the jail. Arrangements were made for father and son to speak at the Mercer County Prosecutor's Office. At 2:15 p.m. they finally had the opportunity to be alone, and spoke to one another for 15 to 20 minutes. (T 35-7 to 21 - Sept. 15) Nathaniel Harvey told his father that he did not commit the murder he was being questioned about, (T 43-6 - Sept. 16), and that the police at West Windsor Headquarters had hit him a few times. His father saw bruises on his son's face. (T 42-17 - Sept. 10) Nathaniel Harvey had previously told Detective Smith that he had been struck by the police. (T 134-13 - Sept. 12)

As Robert Harvey came out of the room his son was being held in, Rizzo and Zimmerman entered. They asked for the details of the murder, without providing any Miranda warning, not even a "reminder," and were given information and answers about the crime for the next 40 minutes. (T 15-25 to 16-25; T 36-1 to 25 - Sept. 15) No simultaneous record of this confession was made, so the detectives arranged to move into a room with a word processing operator who was instructed to type an interrogation. It, however, proceeded only as far as the Miranda warnings because Harvey requested a lawyer. (T 39-22 - Sept. 15) So the detectives arranged to return Harvey to the County Jail, and five days

In his appeal which was decided by the New Jersey Supreme Court, defendant asserted both that his statements were involuntary and that they were obtained after the police failed to scrupulously honor his assertion of his right to remain silent in violation of the rule set forth in State v. Hartley, 103 N.J. 252, 511 A.2d 80 (1986). The New Jersey Supreme Court held that the Hartley rule did bar the introduction of the defendant's confession and that the court need not consider defendant's claim that his confusion was involuntary. 121 N.J. at 425, 581 A.2d at 491. (App. A. at 15)

SUMMARY OF ARGUMENT

Because the decision of the New Jersey Supreme Court is plainly based on a bona fide adequate and independent state ground, this Court should deny the petition. The decision of the New Jersey Supreme Court also correctly applies federal constitutional law to the facts of the present case and does not present an important question of federal law which has not been but should be settled by the United States Supreme Court.

REASONS FOR DENYING THE WRIT

I. THIS COURT MUST DECLINE JURISDICTION BECAUSE THE NEW JERSEY SUPREME COURT DECISION IS CLEARLY SUPPORTED BY ADEQUATE AND INDEPENDENT STATE GROUNDS.

There is nothing ambiguous about the intention of the New Jersey Supreme Court to rely upon state law as an alternative basis for its decision in this case and in its decision in State v. Hartley, 103 N.J. 252, 511 A.2d 80 (1983), which is the basis for its decision to suppress Mr. Harvey's confession. The prosecutor does not contend that either the Hartley decision or the Harvey decision does not contain a plain statement that its decision rests upon adequate and independent state grounds. What the prosecutor does contend, however, is that the New Jersey Supreme Court is being deceitful, is engaged in a sham and is wrong in its decision on a question of state law. (SP 19) The prosecutor's argument is nothing less than an assault on the authority of the New Jersey's court to interpret its own state law.

The plain statement rule of Michigan v. Long 463 U.S. 1032, 1042 (1983) was recently reiterated and explained in Harris v. Reed, 489 U.S. 225, 109 S.Ct. 1038 (1989). The Reed decision held that the Michigan v. Long plain statement rule applied in cases on Federal habeas review as well as in cases on direct review in the Supreme Court. Id. at 103 S.Ct. 1040. The Reed decision explained that the Michigan v. Long rule was formulated to avoid difficulties that occur due to ambiguity in the state

court's opinion. The Reed decision explained that the Supreme Court:

> long has held that it will not consider an issue of federal law on direct review from a judgement of a state count if that judgement rests on a state law ground that is both "independent" of the merits of the Federal claim and an "adequate" basis for the court's decision.

489 U.S. at 260.

Because this determination may be made difficult by ambiguity in the state court's opinion the Supreme Court set forth the plain statement rule:

> Under Long, if "it fairly appears that the state court rested its decision primarily on federal law", this Court may reach the federal question on review unless the state court's opinion contains a "plain statement that [its] decision rests upon adequate and independent state grounds." Id. at 1042, 103 S.Ct. at 3477.

489 U.S. at 261. (emphasis supplied) The Hartley decision is clearly based on alternative grounds, both federal constitutional law and the state common law privilege against self-incrimination. 103 N.J. at 256, 260, 261, 263, 268, 271, 278, 279, 284, 285, 286; 511 A.2d at 82, 84, 85, 88, 90, 94, 97, 98 (1986). The Reed decision makes clear that a state court may reach and decide the federal question in the alternative to the state law question. However the decision on the federal question will not permit review by this Supreme Court when the state court's opinion contains a plain statement that its decision relies upon adequate and independent state grounds.

The Reed decision further explained that:

> A state court need not fear reaching the merits of a federal claim in an alternative holding. By its very definition, the adequate and independent state ground doctrine requires the federal court to honor a state holding that is a sufficient basis for the state court's judgement, even when the state court also relies on federal law. See Fox Film Corp. v. Muller, 296 U.S. 207, 210, 56 S.Ct. 183, 194, 80 L.Ed. 158 (1935).

489 at 264 n.10. (emphasis supplied) In this case, as in Hartley, the State Supreme Court reached the merits of the federal claim in an alternative holding. 121 N.J. at 421, 581 A.2d at 489 (App. A. at 12) The prosecutor is asking this Court to refuse to honor a state court holding based on state law by asserting that the holding is a sham and is incorrect as a matter of state law. Such a request defeats the purpose of the plain statement rule because it would require the federal court to conclude that the state supreme court erred on the state law issue before deciding to consider the federal Constitutional issue. This court in Long stated that the plain statement rule would "obviate in most instances the need to examine state law in order to decide the nature of the state court decision." 463 U.S. at 1042.

A recent decision of the Fifth Circuit premised on Michigan v. Long in a capital murder case supports respondent's argument. In Russell v. Lynaugh, 892 F.2d 1205 (5th Cir. 1989), the court held that

> [r]espect for the independence of state courts has been one of the primary cornerstones for the refusal of federal courts to decide cases where there is an adequate and independent state ground.

> Michigan v. Long, 103 S.Ct. at 3476. We do not know how that Texas Court of Criminal Appeals could have been clearer in asserting an independent state ground as a basis for rejecting the Witherspoon claims in this case. To ignore this emphatically stated basis for the state court's ruling stated on three occasions in its ruling would certainly exhibit disrespect for the judgement of the state court and its right as an independent judiciary to apply its own constitutionally proper laws in deciding its own cases.

Id. at 1211. Respondent submits that the Hartley decision went to great lengths to be clear in its assertion that its decision was based on adequate and independent state grounds. The Hartley decision explicitly states that

> To the extent that we rely on Federal precedent in reaching our state law decision, we do so only for the purpose of guidance, recognizing that those precedents may not compel the result we reach today. See Michigan v. Long, 436 U.S. at 1041, 103 S.Ct. at 3476, 77 L.Ed. 2d at 1214.

121 N.J. at 286, 511 A.2d at 98. The New Jersey Court was clearly relying upon the direction of this court in Long that

> if a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgement or its opinion that the federal cases are being used only for the purpose of guidance and do not compel the result that the court has reached. In this way, both justice and judicial administration will be greatly improved. If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds were of course will not undertake to review that decision.

463 U.S. at 1042.[1] Respondent submits that observations of Russell v. Lynaugh, supra, decision regarding the exhibition of disrespect for the judgement of state courts can clearly be discerned in the prosecutor's petition, which reeks with disrespect for the New Jersey Supreme Court.

The prosecutor asserts that this case is North Carolina v. Butler, 441 U.S. 369 (1979), revisited. (SP 7) However, in that decision the North Carolina court did not rely upon state law but relied only upon the United States Constitution. The prosecutor neglects to mention the footnote which was appended to the portion of the opinion he quotes. This Court stated that, "By the same token this Court must accept whatever construction of a state constitution is placed upon it by the highest court of the state." Id. at 377, n.7.[2] This footnote is consistent with numerous decisions that have held that the United States Supreme Court will accept the ruling of a state's highest court as to

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[1] Prior to the court's decision in Hartley, N.J. Supreme Court Justice Stewart Pollock in an article concerning the Michigan v. Long, decision concluded that "[t]o avoid Supreme Court review of a decision based on its state constitution, a state court discussing federal law must make a plain statement that it used federal law for guidance only". Pollock, "Adequate and Independent State Grounds as a Means of Balancing The Relationship between State and Federal Courts' 63 Tex. L Rev. 977, 999 (1985) Justice Pollock relied upon an opinion of the New Hampshire Supreme Court State v. Ball 124 N.H. 226, 471 A.2d 347 (1983 and an opinion of the Rhode Island Supreme Court concerning which this Court denied the state's petition for certiorari. State v. Von Bulow, 475 A.2d 995 (R.I. 1984) cert. denied 469 U.S. 875 (1984)

[2] Respondent also notes that the Supreme Court of Pennsylvania has, pursuant to its supervisory powers and based on its interpretation of the Pennsylvania Constitution, refused to follow North Carolina v. Butler, in Commonwealth v. Busey, 486 Pa. 221, 404 A.2d 1309, 1314 (1979).

interpretations of state law. Justice O'Connor, sitting as a Circuit Justice, has recently observed in California v. Freeman, ____ U.S. ____, ____, 109 S.Ct. 854, 856 (1989), that:

> interpretations of state law by a state's highest court are, of course, binding upon this Court. O'Brien v. Skinner, 414 U.S. 524, 534, 94 S.Ct. 740, 743, 38 L.Ed.2d 762 (1974); Murdoch v. City of Memphis, 20 Wall. 590, 22 L.Ed. 429 (1875).[3]

Clearly, the prosecutor has filed the present petition in the hope that this Court would not agree with the Hartley decision's bright line requirement of fresh Miranda warnings whenever police commence to reinterrogate a suspect who has previously invoked his right to remain silent. Even if one assumes the prosecutor is correct, a contrary ruling by this Court would not require the New Jersey Supreme Court to alter its ruling based on state law. The New Jersey Supreme Court "has frequently resorted to [its] own state constitution in order to afford [its] citizens broader protection of certain personal rights than that afforded by analogous or identical provisions of the federal Constitution." State v. Novembrino, 105 N.J. 95, 145, 519 A.2d 820, 849 (1987). There can be no dispute that:

> A state is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards. See, e.g., Cooper v. California, 386 U.S. 58, 62, 87 S.Ct. 788, 791, 17 LEd.2d 730 (1967); Sibron v. New York, 392 U.s. 40,

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[3] This court subsequently denied the petition for certiorari ____ U.S. _____ 109 S.Ct. 1133 (1989) and denied a motion for rehearing, ____ U.S. ____ 109 S.Ct. 1660 (1989).

60-61, 88 S.Ct. 1884, 1901-1902, 20 L.Ed.2d 417 (1968).

Oregon v. Hass, 420 U.S. 714, 720 (1975) (emphasis in original). This Court in California v. Ramos, 463 U.S. 992, 1015 (1983), noted that "[it] is elementary that states are free to provide greater protections in their criminal justice systems than the federal Constitution requires."[4] See also Pruneyard Shopping Center v. Robbins, 447 U.S. 74, 82 (1979); Lego v. Twomey, 404 U.S. 477, 489 (1972); Cooper v. California, 368 U.S. 58, 62 (1967). With regard to such state court decisions, former Justice William Brennan has written:

> the State decisions not only cannot be overturned by, they indeed are not even reviewable by the Supreme Court of the United States.
>
> We are utterly without jurisdiction to review such decisions. The Supreme Court's jurisdiction over state cases is limited to the correction of errors related solely to questions of federal law: it cannot review state court determinations of state law even when the case also involves federal issues. Murdock v. City of Memphis, 87 U.S. (20 Wall) 590 (1875). Moreover, if a state ground is independent and adequate to support a judgment, the Court has no jurisdiction at all despite the presence of a federal issue.

Brennan, "State Constitutions and the Protections of Individual Rights," 90 Harv. L.Rev. 489, 501, n.80 (1977). See also International Longshoreman's Ass'n v. Davis, 467 U.S. 380, 388 (1986).

If this Court was to grant certiorari and overrule the New Jersey Supreme Court's ruling based on federal constitutional

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[4] Defendant notes that the California Supreme did so when it decided the case on remand. People v. Ramos, 37 Cal. 3d 136, 207 Cal. Rptr. 800, 689 P.2d 430 (1984).

law, the decision as to application of state law would still stand. This Court would have issued an advisory opinion. On remand the New Jersey court would reverse the conviction on the basis of the New Jersey common law right against self-incrimination. "This is precisely the result that the doctrine of adequate and independent state grounds seeks to avoid." California v. Freeman, ____ U.S. at ____ 109 S.Ct. at 856. Justice O'Connor in the Freeman decision, Justice Brennan in the above cited article and the Michigan v. Long opinion, 463 U.S. at 1043, all rely upon Herb v. Pitcairn, 324 U.S. 117, 126 (1945), for the proposition that the United States Supreme Court should not render advisory opinions by correcting a state court's view of federal law when the same judgment would be rendered on the basis of state law.

The prosecutor's argument that Hartley created the New Jersey common law privilege against self-incrimination upon a misinterpretation of federal law is meritless. As explained in a concurring opinion to this Court's decision in New Jersey v. Portash, 440 U.S. 450, 461 (1979) (Brennan, J., concurring):

> The privilege against self-incrimination is not set out in the New Jersey Constitution. Its origins are instead to be found in the common law, see State v. Fary, 19 N.J. 431, 434-435, 117 A.2d 499, 501-502 (1955), and in statutes. See N.J.Stat.Ann. sec. 2A:84A-19 (West 1976). Although New Jersey courts have looked to constructions of the Fifth Amendment of the Federal Constitution as a source of illumination for the interpretation of the state privilege, see In re Pillo, 11 N.J. 8, 15-17, 93 A.2d 176, 179-180 (1952), they have also held that the interpretation of that privilege is "a

> matter of state law and policy, as to which [New Jersey] may impose standards more strict than required by the federal Constitution, which standards will control regardless of the final outcome of the question in the federal sphere." State v. Deatore, 70 N.J. 100, 112, 358 A.2d 163, 170 (1976). Cf. State v. Johnson, 68 N.J. 349, 353, 346 A.2d 66, 67-68 (1975).

The prosecutor's contention that the Supreme Court of New Jersey has endeavored to alter federal constitutional law is clearly erroneous. The New Jersey Supreme Court's resolution of that issue, while it surely may be considered persuasive, is not binding on any federal court or court of another state. New Jersey's highest tribunal has considered the prosecutor's argument that the rule established in Hartley will lead to "societally counterproductive results" and has rejected it as a matter of state law. No pressing question of federal law requires that this case be reviewed by the United States Supreme Court.

The prosecutor's efforts to strip the New Jersey Supreme Court of its sovereign authority to protect the rights of its citizens on basis of its interpretation of state law must be rejected. Strong reasons for this have been set forth by Justice Stewart Pollock:

> Deference by the United States Supreme Court to state court decisions based on state law has become an integral part of federal jurisprudence. This principle is crucial also to the vitality of the partnership between state and federal courts. By respecting such judgments, the high court honors state courts as partners in the federalist system especially when the federal

constitution would lead to a different result.

Pollock, supra, 63 Tex. L.Rev. at 980. Therefore, as in Township of Mount Laurel v. Southern Burlington County NAACP, 423 U.S. 808 (1975), the petition should be denied "for want of jurisdiction." Id. In that case this Court declined to review Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (1975), which was decided on the basis of the New Jersey state constitutional requirements of substantive due process and equal protection of the laws.

II THE NEW JERSEY SUPREME COURT CORRECTLY DETERMINED AS A MATTER OF FEDERAL LAW THAT MR. HARVEY'S CONFESSION WAS UNCONSTITUTIONALLY OBTAINED DUE TO THE FAILURE OF THE POLICE TO SCRUPULOUSLY HONOR HIS REQUESTS TO REMAIN SILENT.

The use of Mr. Harvey's oral confessions and statements at trial violated his fundamental right not to be compelled to be a witness against himself, as they were obtained after police failed to scrupulously honor his assertion of his right to remain silent. U.S. Const. Amend. V; U.S. Const. Amend. XIV; Miranda v. Arizona, 384 U.S. 436 (1966); Michigan v. Mosley, 423 U.S. 96 (1986).

The New Jersey Supreme Court's decision in this case as was its decisions in State v. Hartley, 103 N.J. 252, 511 A.2d 80 (1986), State v. Bey, 122 N.J. 45, 548 A.2d 846 (1988) (Bey I) and State v. Bey, 112 N.J. 123, 548 A.2d 887 (1988) (Bey II), is a correct application of Michigan v. Mosley, 423 U.S. 96 (1975). The police in this case failed to scrupulously honor Mr. Harvey's requests to remain silent. Therefore, his confession must be suppressed. There is no need for this Court to grant the prosecutor's petition to review a decision squarely premised on this Court's decision in Michigan v. Mosley. The New Jersey Supreme Court in this case has not decided an important question of federal law which has not been, but should be settled by the United States Supreme Court. Nor has it decided a federal question in a way that conflicts with applicable decisions of this Court.

CONCLUSION

For the foregoing reasons, respondents submit that this Court should deny petitioner's petition for a writ of certiorari.

Respectfully submitted,

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DATED: February 11, 1991